Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

October Term, 1994

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO, OREGON,

Respondents.

Petition For Writ Of Certiorari
To The Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a municipality condition a land use authorization upon the applicants' surrender of their own and their successors' right to oppose formation of a local improvement district?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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OPINIONS BELOW

The Findings, Conclusion, and Order of the Lake Oswego City Council upholding the validity of the challenged non-remonstrance agreement is reprinted in the Appendix ("App.") at 40a. That order was appealed to the next appellate body in Oregon, the Land Use Board of Appeals ("LUBA") (LUBA

No. 93-174). Its order denying relief is reported at 26 LUBA 515 (1994) and is reprinted in the App. at 13a. The LUBA order was appealed to the Oregon Court of Appeals (C.A. No. A83141) and its decision denying relief is reported at 127 Or. App. 647, 874 P.2d 99 (1994) and is also reprinted in the App. at 50a. A timely petition for review of the decision of the Oregon Court of Appeals was filed with the Oregon Supreme Court (S.C. No. S41368). A majority of the Oregon Supreme Court decided not to grant the petition for review (see App. at 54a); Justice Durham would have granted the petition. 320 Or. 110, 881 P.2d 141 (1994).

JURISDICTION

The decision of the Oregon Court of Appeals, review of which is sought on petition, was entered on May 4, 1994. On September 6, 1994, the Oregon Supreme Court denied review. This Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1257(a) (1994).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

42 U.S.C.A. § 1983 (1994) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1973i(a) (1994) provides:

> No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of subchapters I-A to I-C of this chapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

28 U.S.C.A. § 1257(a) (1994) provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of

> the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

William and Debra Larsson petition this court for a writ of certiorari to the Oregon Supreme Court to review the opinion in *Larsson v. Lake Oswego*, 127 Or. App. 647, 874 P.2d 99 (1994).

A. The Facts.

In 1990 the City of Lake Oswego (the "City") approved Petitioners' application to divide their property upon which their home was (and is) located into two lots. In the order approving that minor partition, the City administrative staff imposed a number of conditions on the Larssons, among them that they provide a cash deposit for future construction of bikepaths adjacent to the property, *see* App. 51a, and that they enter into a "non-remonstrance agreement" with the City, *see* App. 56a. By its terms, the nonremonstrance agreement, which is to run for 20 years unless extended for an additional 20 years by the City, (1) states that the Larssons and their successors thereby waive "any and all right to remonstrate against" future street improvements, (2) contains an "irrevocable consent" to formation of a Local Improvement District ("LID"), (3) states that the Larssons and their successors "consent" to the inclusion of their property within the zone of benefit for assessment purposes, and (4) asserts that the Larssons and their successors thereby waive any right to

remonstrate against future assessment practices. The non-remonstrance agreement is reprinted at App. 56a.

B. Challenges to Nonremonstrance Agreement.

The Larssons were not represented by legal counsel during the course of the minor partition activities. Once issued, the minor partition decision was not appealed, and consequently the property has since been divided into two lots. In 1993, however, the Larssons came to suspect the validity of the two conditions described above, and accordingly they sought modification of the prior decision by deleting the two conditions and seeking a refund of the bikepath funds already paid to the City.

The administrative staff denied the Larssons' request for relief, and thus the matter was appealed to the City's Development Review Board, which also denied relief. *See* App. 43a-44a. At that point the matter was appealed to the City Council, which rescinded the requirement that funds be deposited for bikepaths and ordered those funds repaid with interest. *See* App. 52a. That refund has since been paid. The City Council, however, refused to rescind the condition requiring a nonremonstrance agreement, whereupon that refusal was appealed to the next Oregon appellate body, LUBA. LUBA likewise refused relief, App. 1a, and the Oregon Court of Appeals affirmed the LUBA decision without independent justification for its reasons for so doing. App. 1a. Petitioners timely sought discretionary review in the Oregon Supreme Court. After filing that petition, this Court handed down *Dolan v. Tigard*, 114 S. Ct. 2309 (1994) ("*Dolan*"), which case arose in Tigard, Oregon, a municipality that abuts the City on the west. Because the Larssons have continuously claimed that the City's required submission of the nonremonstrance agreement violated the doctrine of unconstitutional conditions, Petitioners brought that portion of the *Dolan* opinion dealing with unconstitutional conditions to the Oregon Supreme Court's attention.

Nonetheless, the Oregon Supreme Court denied discretionary review. App. 54a.

The federal question was raised at every level, *viz.*, before the Lake Oswego Administrative Staff, *see* App. 68a; the Lake Oswego City Council, *see* App. 40a; before LUBA, *see* App. 13a; before the Oregon Court of Appeals, *see* App. 1a; and before the Oregon Supreme Court, *see* App. 54a.

REASONS FOR GRANTING THE WRIT

The nonremonstrance agreement, a commonplace in Oregon and perhaps many other states,[1] is yet another result of government's abuse of its power to condition land use permits in order to gain unwarranted advantage over private property owners. In recent years this Court twice struck down governmental exactions of property interests in return for land use authorizations. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan*. Here, however, the governmental target was not a simple property right; rather, here the government required the surrender of the applicants' civil and political rights in return for a land use authorization.

This petition requests the Court to accept this case for review for two substantive and interrelated reasons, *viz.*, that the nonremonstrance agreement violates Petitioners' civil and political rights and that the nonremonstrance agreement, like the property taken in *Dolan*, was exacted as the consequence of an unconstitu-

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[1] An informal survey indicated that many Oregon cities and counties employ nonremonstrance agreements to facilitate the formation of LIDs; indeed, the League of Oregon Cities filed an *amicus* brief in support of the City before the Oregon Court of Appeals. *See* App. 1a.

tional condition in a land use authorization. In *Dolan*, this Court discussed the practice of unconstitutional conditions as follows:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. See *Perry v. Sindermann, 408 U.S. 593 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972); Pickering v. Board of Ed. of Township High School Dist., 391 U.S. 563, 568 88 S. Ct. 1731, 134, 20 L.Ed.2d 811 (1968).*

114 S. Ct. 2309, 2317 (1994).

Review is particularly appropriate in this instance because, although the Oregon Supreme Court was explicitly requested to consider the Larssons' claim of unconstitutional conditions in light of the instructions this Court gave in *Dolan*, *see* App. 70a, that court declined even to consider the issue. Accordingly, at a minimum Petitioners request that this Court grant the petition for certiorari and instruct the Oregon Supreme Court to apply the doctrine of unconstitutional conditions as announced in *Dolan* to the present controversy.

I.

THE NONREMONSTRANCE AGREEMENT VIOLATES THE FIRST AMENDMENT TO THE U.S. CONSTITUTION[2]

The first question is whether the nonremonstrance agreement can reasonably be interpreted as affecting speech[3] because, if it does affect speech, important constitutional guarantees are triggered. Beginning with the words of the agreement itself--"we hereby expressly waive *any and all right to remonstrate*," App. 56a (emphasis added), it is clear that speech is the intended target of the City's requirement. The common dictionary defini-

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[2] The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. The First Amendment governs actions of states, *Gitlow v. New York*, 268 U.S. 652 (1925), as well as municipal actions. *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938).

[3] Of course, "speech" protected by the First Amendment is not limited to traditional reasoned political discourse; indeed, the following activities have been found to trigger First Amendment protections: flag burning, *United States v. Eichman*, 496 U.S, 310 (1990); superimposing material on U.S. flag, *Spence v. Washington*, 418 U.S. 405 (1974); long hair and beards, *see, e.g., King v. California Unemployment Ins. Appeals Bd.*, 25 Cal. App. 3d 199, 101 Cal. Rptr. 660 (1972); and offensive bumper stickers, *Baker v. Glover*, 776 F. Supp. 1511 (M.D. Ala. 1991). In this controversy, however, the speech targeted by the City is purely political in nature.

tion of "remonstrate" is "*[T]o say or plead* in protest, reproof, or opposition ~ *vt* : to present and urge reasons in opposition . . . ." *Webster's Seventh New Collegiate Dictionary* 725 (1971) (emphasis added).[4] There can be no doubt that the purpose of the nonremonstrance agreement is to restrict the ability of those bound by nonremonstrance agreements to express opposition to an action that the government desires to take.

A second important question is how the nonremonstrance agreement affects speech. Again, the answer is clear: As construed by LUBA, the agreement attempts to restrict the only effective means available to oppose City formation of LIDs--submission of written remonstrances.[5] LIDs are routinely formed to improve streets and carry out other construction and maintenance projects and, under the Lake Oswego City Charter, the only legal way a citizen can effectively oppose formation of a LID is by filing a written "remonstrance" with City officials. App. 23a.

In sum, the right to remonstrate is the right to speak, and the purpose of the nonremonstrance agreement is to restrict property owners' rights to express opposition to a governmental policy. As a result, First Amendment protections are triggered.

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[4] A more recent dictionary defines "remonstrance" as "an earnest presentation of reasons for opposition or grievance; *esp*: a document formally stating such points." *Webster's Ninth New Collegiate Dictionary* 996 (1989).

[5] As LUBA states, the nonremonstrance agreement reflects an "agreement that [the Larssons] will not file a LOC 40.050(1) remonstrance with the city recorder." App. 23a.

A. The Nonremonstrance Agreement Unconstitutionally Regulates the Content of Political Speech.

As noted above, the simple definition of "remonstrate" establishes that speech is the target of the agreements, and the speech intended to be prevented is clearly political in nature. Speech, and particularly political speech, is protected by the First Amendment.

To determine the validity of a government action claimed to restrict freedom of expression, the First Amendment requires the judiciary first to determine whether the act is intended to restrict communication. Government action aimed at restricting expression is suspect. As this Court stated in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Neither are governments permitted to justify the infringement on the basis of some general public good; for example, in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court ruled that the state Board of Pharmacy could not justify restrictions on pharmacist advertising by referring to the negative consequences of price competition among pharmacists. The Court stated that the First Amendment favors free expression over otherwise important public goals.

Once it is determined that the governmental action is intended to restrict free expression, the action is unconstitutional unless the government can demonstrate that the expression is unprotected or that the restriction is necessary in order to achieve a compelling state interest. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980). A remonstrance is clearly protected speech, and thus the question becomes whether the nonremonstrance agreement is necessary to accomplish a compelling state interest. In this vein, the City identified only *one* benefit

from requiring the nonremonstrance agreement: avoiding a potential six-month delay in LID formation. App. 47a. Avoiding a potential six-month delay is simply *not* a compelling state interest.

There is, however, a second benefit accruing to the City that was not articulated: the procedural advantage of escaping political and other opposition when it seeks to improve local governmental services. Put less charitably, the nonremonstrance agreement can be viewed as an attempt to allow the City to ride roughshod over those who might want to question its development plans. The agreement appears to be premised on the notion that the City operates more efficiently when there is no effective opposition to the government's chosen course--a proposition that, frankly, is an anathema to freedom. In any event, this unacknowledged "benefit" likewise surely can not rise to the level of a "compelling state interest."

The City Council suggested that the agreement be upheld because no one forced the Larssons to apply for the partition. App. 49a. This point merely reinforces the basis for an independent constitutional challenge, *viz.*, that government may not condition a benefit on the surrender of a constitutional right. Moreover, addressing the agreement itself, there was no bargaining or choice; the City dictated the terms of the nonremonstrance agreement and required that those express words be adopted as a condition of approval of the partition. The assertion that the nonremonstrance agreement was freely entered into is simply wrong.

B. The Nonremonstrance Agreement Is Unconstitutional Because its Vagueness Chills Protected Speech.

Not only does the nonremonstrance agreement unconstitutionally restrict political speech, it unconstitutionally chills the exercise of First Amendment freedoms. Because the nonremonstrance agreement is contained as a condition in a development permit, a reasonable person bound by such an agreement would reasonably want to know what sanctions could be imposed for breach of the agreement. And there are indeed sanctions for violating such an agreement; specifically, section 49.16.050(1) of the Lake Oswego City Code provides:

> Any person who fails to comply with, or who violates, any provision of this chapter, *or who fails to carry out the terms and conditions of any development approval*, shall have committed a civil infraction subject to a forfeiture of not less than $50.00 or more than $500.00 per violation and enforceable pursuant to LOC 34.04.101 to 34.04.145. Each day that the violation exists shall constitute a separate violation.

(Emphasis added.)[6] Section 49.16.050 is reprinted as App. 55a. LUBA conceded that neither the agreement itself nor the City Code contains a definition of "remonstrance" or "remonstrate,"[7] and LUBA spent considerable effort simply trying to divine what all might be encompassed within the term. App. 18a-25a.

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[6] Interestingly, although the criminal sanction for violation of the nonremonstrance agreement was briefed and argued to LUBA, the board did not consider that sanction in its order.

[7] During oral argument before LUBA the City conceded that it would indeed enforce the nonremonstrance agreement.

Given the vagueness of the prohibition and the potential magnitude of the penalty, it is to be expected that communications not directly prohibited by the nonremonstrance agreement will be foregone. These factors all suggest a separate basis for invalidating the nonremonstrance agreement: It chills protected political speech. As a leading text states:

> Several rationales require special judicial strictness when reviewing laws that regulate fundamental constitutional rights, such as the freedoms of speech, assembly, or association, to insure that such regulations are not vague. First, the requirement that a law place persons on notice as to precisely what activity is made criminal is of special importance when the activity distinguishes between criminal activity and activity that constitutes a fundamental constitutional right. To the extent that the law is vague and relates to fundamental constitutional rights, it might have an "in terrorem" effect and deter persons from engaging in activities, such as constitutionally protected speech, that are of particular constitutional importance. In other words, an unclear law regulating speech might deter or chill persons from engaging in speech or activity with special protection under the Constitution.

John E. Nowak et al., *Constitutional Law* § 16.9 (3d ed. 1986).

Because the scope of the prohibition is uncertain at best, the Larssons (and the hundreds of persons similarly situated) cannot know in advance what specific conduct is prohibited. Because significant criminal sanctions lie for violation of the prohibition, the Larssons and persons similarly situated can

reasonably be expected to eschew engaging in protected speech in order to avoid any possibility of violating the prohibition. For these reasons, the prohibition itself must be declared invalid and void.

C. The Nonremonstrance Agreement Is Unconstitutionally Overbroad.

Yet another First Amendment doctrine compels the invalidation of the nonremonstrance agreement: overbreadth. The overbreadth doctrine, which to some degree parallels the "void for vagueness" doctrine discussed above, applies when the government seeks to regulate communications in a manner that *might* mute protected speech, leaving perceived grievances to fester. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *see also Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (even an otherwise legitimate restriction must be exercised in a manner that avoids undue infringement on protected speech).

Under the doctrine of overbreadth, the court may not only consider the impact of the nonremonstrance agreement on Petitioners, it must also consider the potential impact of such agreements upon third parties. Although jus tertii--raising the rights of third parties not before the tribunal--generally is not allowed, when First Amendment freedoms are involved the tribunal must entertain *possible* restrictions of speech that *may* be unconstitutional if applied to third parties in certain circumstances. *Broadrick*, 413 U.S. 601; *see also Bigelow v. Virginia*, 421 U.S. 809 (1975) (information regarding abortion). Based upon a cursory review of the property records in the Clackamas County courthouse, it appears that the City has recorded approximately

175 nonremonstrance agreements in the past seven years alone.[8] Many of those agreements appear to have been taken from large developers before construction of dwellings, and therefore many of those bound by nonremonstrance agreements will have had no opportunity whatsoever to negotiate or even address the terms and scope of the agreement that purports to bind them. Certainly a reasonable layperson with only a dictionary would feel a chill on his First Amendment freedoms when informed that his predecessor in title had "waived" his right to "remonstrate" against future City development actions.

The overbreadth doctrine requires the Court not only to consider the actual application of the government action in the instant circumstances but also to consider "possible applications of the statute in other factual contexts besides that at bar." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). In this vein, the Court should consider how the hundreds of other property owners who are bound by identical nonremonstrance agreements might reasonably perceive the restrictions those agreements place on them. Because the agreements are drafted in a broad fashion (*e.g.*, by prohibiting "*any and all* right to remonstrate," LUBA Rec. 143), one bound thereby reasonably could conclude that *any* expressed opposition to a proposed government policy is circumscribed. Such a person might reasonably conclude that the prohibition against "any and all" remonstrances encompasses a *letter* to the mayor regarding street improvements. And would it not be reasonable for a person bound by such an agreement to believe that he may not even disagree with the *method* of implementation of such improvements? Could such a person feel safe in discuss-

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[8] Another one of those hundreds of nonremonstrance agreements was the subject of recent litigation in the Oregon Court of Appeals, *Nelson v. Lake Oswego*, 126 Or. App. 416, 869 P.2d 350 (1994), and was mentioned in the Nelsons' *amicus* brief submitted in support of the Petitioners in *Dolan v. Tigard*, 114 S. Ct. 2309 (1994).

ing future street improvements with their neighbors if such might lessen the likelihood of the City's plan for improvements being adopted? And what sanctions might such a person fear as a consequence of violating the covenant? A lawsuit for damages? If so, how much? An injunction? Would the City attempt to enforce the nonremonstrance agreement by resort to the criminal sanctions of section 49.16.050(1) of the Lake Oswego City Code?[9] In light of these considerations, it should not be surprising that those bound by these pernicious agreements will be reluctant to express publicly any views on future City action regarding streets and physical development of the neighborhood unless nonremonstrance agreements are declared invalid.

D. The Nonremonstrance Agreement Unconstitutionally Compels Political Speech.

Even if the nonremonstrance agreement could be read both precisely and narrowly, it would be invalid on a variety of other First Amendment grounds. For example, one of the primary directives of the First Amendment is that freedom *of* speech connotes freedom *from* speech. Put differently, the First Amendment prevents the government from compelling individuals to

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[9] That provision provides:

> Any person who fails to comply with, or who violates, any provision of this chapter, *or who fails to carry out the terms and conditions of any development approval*, shall have committed a civil infraction subject to a forfeiture of not less than $50.00 or more than $500.00 per violation and enforceable pursuant to LOC 34.04.101 to 34.04.145. Each day that the violation exists shall constitute a separate violation.

App. 55a.

adopt positions with which they disagree. Thus New Hampshire could not prevent a motorist from covering up the license plate slogan, "Live Free or Die." *Wooley v. Maynard*, 430 U.S. 705 (1977); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (government may not compel press to provide political candidates with right to reply to newspaper's criticism). Here, however, the City's nonremonstrance agreement required Petitioners to "irrevocably *consent* to the formation of a Local Improvement District . . . the inclusion of [their] property within a zone of benefit . . . ." App. 56a (emphasis added). Because the nonremonstrance agreement compelled Petitioners (and, for that matter, all of their successors in title) to adopt a position with which they may well disagree, it violates the First Amendment to the U.S. Constitution.

E. The Nonremonstrance Agreement Unconstitutionally Inhibits the Right To Petition for Redress of Grievances.

There is yet another substantive reason the City's attempted justification should not be allowed to stand. The purpose of the nonremonstrance agreement is to authorize the City to disregard completely any political positions that Petitioners may urge upon it. This position is akin to asserting, "You can talk, but we won't listen." Put into First Amendment terms, the assertion would be, "You can seek to be heard all you want; because of the nonremonstrance agreement, we don't have to listen." This is not freedom of expression, for freedom of expression is not limited to the right to speak; rather, freedom of expression (and particularly the right to petition the government for redress of grievances) connotes the right to be *heard* in a meaningful way. The agreement denies Petitioners that right to be heard.

For all of the foregoing reasons, the nonremonstrance agreement violates the First Amendment to the U.S. Constitution.

F. The Nonremonstrance Agreement Impairs Voting Rights.

One effect of the nonremonstrance agreement is to register a positive vote in favor of LID formation. Such effect violates federal law by disenfranchising those who are forced to sign the agreements and their successors in title. Two federal statutes are implicated by the City's demand for a nonremonstrance agreement, *viz.*, the Voting Rights Act, 42 U.S.C.A. § 1973i(a) (1994), and the general civil rights statute, 42 U.S.C.A. § 1983 (1994).

This claim is, of course, based on the proposition that nonremonstrance agreements affect the right to vote. Unfortunately, "vote" is not defined in the statutes, and thus its common meaning must be determined. The first four definitions of "vote" in *Words and Phrases* are:

> A "vote" is but expression of voter's will. State ex rel. Thrailkill v. Amlin, 13 Ohio Dec. 334.
>
> The noun "vote" means expression of the choice or preference of a voter. Mann v. Housing Authority of City of Paterson, 89 A.2d 725, 727, 20 N.J.Super. 276.
>
> A "vote" is a formal expression of a wish, will, or choice in regard to any measure proposed. Port of Palm Beach Dist. v. State, 22 So.2d 581, 582, 156 Fla. 99.
>
> A "vote" is the registration in accordance with law of the preference or choice of an elector on a given subject. State v. State Board of Canvassers, 172 N.W. 80, 87, 44 N.D. 126.

44A Words and Phrases 3 (perm. ed. 1962). From the foregoing it is clear that, because the Larssons' right to register their preference regarding the formation of LIDs is affected by the non-remonstrance agreement, voting rights are implicated.

II.

THE CITY MAY NOT CONSTITUTIONALLY REQUIRE THE SURRENDER OF CONSTITUTIONAL FREEDOMS IN RETURN FOR ITS ISSUANCE OF A DEVELOPMENT PERMIT.

One of Petitioners' central arguments has been that the City may not condition the issuance of a development permit upon the surrender of First Amendment or other constitutional freedoms. A review of the doctrine of unconstitutional conditions establishes that the exercise of governmental police power may not be conditioned upon a citizen's surrender of constitutional rights.

It is a longstanding principle that individual rights may not be "infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). In *Sherbert*, a Seventh-Day Adventist refused to work on Saturday and thus was fired. South Carolina thereupon refused unemployment compensation because of the failure to accept suitable work. This Court invalidated the denial on the grounds the right to a discretionary benefit--unemployment compensation[10]--could not be conditioned upon surrender of First Amendment freedoms. The Court said:

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[10] In the present situation the discretionary benefit was approval of a minor partition.

> In Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L.Ed.2d 1460, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly."

374 U.S. at 405 (citation omitted). Professor Tribe has succinctly stated the proposition:

> The notion that, whenever a privilege or benefit might be withheld altogether, it may be withheld on whatever conditions government chooses to impose, has been repeatedly repudiated since the mid-20th century. Independently unconstitutional conditions--those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right--are invalid; whether a condition is unconstitutional depends on whether government may properly demand sacrifice of the alleged right in the particular context.

Laurence H. Tribe, *American Constitutional Law* § 11-5 at 781 (2d ed. 1988) (footnote omitted).

Recent scholarship has traced the development of the doctrine of unconstitutional conditions and analyzed the increasing need for invocation of the doctrine. Richard A. Epstein, ***Bargaining with the State*** (1993) ("***Epstein***"). According to Professor Epstein, the doctrine is based on the fundamental precept that no entity--not a private party and certainly not the government--should be allowed to use its vastly superior bargaining power to wrest concessions of important rights under the guise of contractual negotiations.[11]

Adopting for a moment the notion that the non-remonstrance agreement reflects a simple commercial transaction (as opposed to fundamental First Amendment rights), would such an agreement be enforceable? Petitioners think not. The judiciary has long recognized that contracts of adhesion, particularly when

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[11] Some of the flavor of Professor Epstein's thesis can be captured from the concluding paragraph of his book:

> The power to contract and to grant, when lodged in the hands of government, may well prove to be as dangerous as the power to take and to regulate. The effort to create an unfettered source of government power at root rests on an apparent position that private parties are entitled to contract for good reason, bad reason, or no reason at all. It then exaggerates the scope of freedom of contract in private transactions, and imputes the same level of freedom to a government whose power must always be questioned [because of] the takings risk that results from its power of taxation and the bargaining risk that results from its monopoly position in all areas of life. . . . [A] government that has any level of monopoly power cannot be trusted to impose whatever conditions it wants . . . ."

Epstein, at 312.

obtained through the exercise of disproportionate bargaining power, are suspect. This notion is reflected in section 208 of the Restatement (Second) of Contracts (1981), which provides:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid the unconscionable result.

The wellspring of this doctrine is *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948), in which the court refused to enforce a standard printed form contract of adhesion on the grounds it was unconscionable. Here likewise there is a contract of adhesion because the City routinely requires applicants for land-use permits to execute identical nonremonstrance agreements.[12] Here, there is vastly disproportionate bargaining power because the Larssons cannot obtain the desired outcome--approval of a minor partition--from any entity other than the City. For the same reason that courts will not permit consumers to be unreasonably disadvantaged by commercial terms in contracts of adhesion, Petitioners submit that municipal bodies should not be allowed to wrest the most cherished civil and political liberties from citizens who merely seek approval to develop their own property.

Applying Professor Epstein's analysis, in the present situation the City is the monopolist: It alone has the power to determine how a landowner can use his own land, including the right to engage in minor partitions. LUBA and the Oregon Court

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[12] Indeed, very recently there was before the Oregon judiciary an identical nonremonstrance agreement. See *Nelson v. Lake Oswego*, 126 Or. App. 416, 869 P.2d 350 (1994).

of Appeals do not deny that the Larssons were faced with a stark choice: obtain approval for more beneficial use of their property or retain their political and civil rights. The City obviously demanded the surrender of the clearly political right to oppose formation of a governmental unit in return for its issuance of a development permit. Certainly the City could not have prohibited political opposition to LID formation directly (*e.g.*, by banning public utterances questioning the wisdom of such governmental bodies), so the City sought to achieve by indirection--using the notion of freedom of contract--to achieve that which it could not accomplish directly. Because the City's monopoly power over land use gives it an unequal bargaining position vis-a-vis property owners, it should not be allowed to impose the Hobson's choice of requiring those owners and their successors to surrender political freedoms or forego more beneficial use of their land.

For all of these reasons, the requirement that the Petitioners grant a nonremonstrance agreement in return for a land use authorization should be invalidated as an unconstitutional condition.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to grant the petition for writ of certiorari to the Oregon Supreme Court.

DATED: December 5, 1994.

Respectfully submitted,

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Counsel for Petitioners

Supreme Court, U.S.
FILED

941009 DEC 5 1994

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1994

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO, OREGON,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

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FILED: May 4, 1994

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO,

Respondent.

(93-174; CA A83141)

Judicial Review from Land Use Board of Appeals.

Argued and submitted April 7, 1994.

Thomas H. Nelson argued the cause for petitioners. With him on the brief was Stoel Rives Boley Jones & Grey.

Jeffrey G. Condit, City Attorney, argued the cause and filed the brief for respondent.

Timothy J. Sercombe and Preston Thorgrimson Shidler Gates & Ellis filed a brief amicus curiae for League of Oregon Cities.

Before Deits, Presiding Judge, and Riggs and Haselton, Judges.

DEITS, P.J.

Affirmed.

Haselton, J., concurring.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[XX] Costs allowed, payable by: Petitioners

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

MONEY JUDGMENT

Judgment #1	Judgment #2*
Creditor: _____	State of Oregon Judicial Department
Debtor: _____	_____
Costs: _____	Unpaid filing fee:
Attorney fees: _____	
TOTAL AMOUNT: $_____	$_____

Interest: Simple, 9% per annum, from the date of this appellate judgment.

*Judgment for unpaid filing fees. ORS 21.605(1)(c).

This section to be completed when the appellate judgment issues.
See ORAP 14.05(3).

NOTICE OF EXPENSES AND COMPENSATION UNDER ORS 138.500(4)

The appellate court has affirmed the conviction in this criminal case and has certified expenses and compensation of appointed counsel. This is notice to the trial court so that it may exercise its discretion under ORS 161.665(2) to include the expenses and compensation of appointed counsel in the final judgment, in addition to transcript preparation expenses allowed by the trial court. The court has certified expenses and compensation in the amount of $_____.

This section to be completed when the appellate judgment issues.

See ORAP 14.05(3).

Appellate Judgment
Effective Date:

COURT OF APPEALS
(seal)

DEITS, P.J.

Petitioners seek review of LUBA's affirmance of the City of Lake Oswego's decision not to modify an approval condition on a previously allowed minor partition. The city declined to eliminate the condition that petitioners agree not to pursue the city's remonstrance procedure in connection with establishing a street improvement district in the vicinity of the partitioned property. We affirm.

Before addressing the merits, a preliminary matter requires comment. Petitioners' brief in this case did not include a copy of LUBA's opinion, as required by our rules. ORAP 5.50(3) and ORAP 4.60. As we explained in Horizon Construction, Inc. v. City of Newberg, 114 Or App 249, 251, 834 P2d 523 (1992), this requirement is not just a matter of form:

> "We note, preliminarily, that petitioner's brief does not have appended to it a copy of LUBA's opinion, as ORAP 5.50(3) and ORAP 4.60 require. When this court prepares for oral argument, the appellate record is not available to us. We have only the parties' briefs. Consequently, LUBA's opinion was not before us at that time, and our ability to prepare for the argument was therefore seriously hampered. Hereafter, violations of the rule will result in our striking a petitioner's brief on our own motion."

In the present case, the city's brief does contain the LUBA opinion as an appendix. This allowed us to effectively prepare for argument. However, we again emphasize the importance of this requirement.

We turn to the merits. Section 40.050 of the City Code provides:

> "Filing of Remonstrance to Formation of Improvement District; Defeat of Proposal by Remonstrance.
>
> "(1) Objections by property owners within the proposed district to the formation of the proposed improvement district must be in writing, and filed with the Recorder not later than the close of business the day of the hearing set forth in LOC 40.060. Except as provided by Section 37 of the Lake Oswego Charter, any proposal to levy and collect any special assessment under this chapter shall be suspended for six months upon written remonstrance of two-thirds of the owners of property to be assessed.
>
> "(2) Oral objections will be considered at the hearing provided in LOC 40.060. However, oral objections shall not be counted for the purpose of suspending the project as provided in subsection (1) of this section."

Petitioners contend that the prohibition of their pursuing the remonstrance procedure infringes their communicative rights under Article I, section 8, and under the First Amendment. The city construed section 40.050 in the context of related code provisions, and rejected petitioners' argument. Its order recites:

> "* * * Lake Oswego Charter Article IX, Section 37 and LOC Chapter 40 govern formation of [limited improvement districts (LIDs)]. LOC 40.060 and 40.090 require two public hearings to be held: The first hearing is to

determine whether the proposed LID should be formed, draw the appropriate boundaries of the LID, determine the appropriate assessment formula and set the appropriate interest rate. The second hearing is to hear objections to the amount of the assessment. LOC 40.050(1) authorizes affected property owners to file written remonstrances objecting to formation of the LID at the time of the first hearing. If written remonstrances are received from at least two-thirds of the property owners, formation of the LID is suspended for 6 months. A non-remonstrance agreement waives the property owner's right to file a written remonstrance and thereby potentially delay the project for six months.

"LOC 40.050(2), however, expressly authorizes and requires the [City] Council to consider oral objections to the project at the first hearing. LOC 40.040 expressly requires the published notice to state that oral objections will be considered at the public hearing. LOC 40.060(2) expressly requires the Council to consider any testimony in addition to written remonstrances in deciding whether to proceed with formation of the LID. LOC 40.080(2) and 40.090 notifies and allows 'all persons' to testify in objection to the proposed assessments at the second hearing. Regardless of whether a person has waived his or her right to delay the project in a non-remonstrance agreement, such persons are notified of their right to appear, and may appear, before the Council at the first and second public hearings and object or otherwise testify regarding the LID on the merits."

LUBA expressed some uncertainty about whether the deferential standard of review under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), is applicable to the city's interpretation

of its prior decision imposing the condition, as distinct from an interpretation of the city's legislation itself. See ORS 197.829; but see Terraces Condo. Assn. v. City of Portland, 110 Or App 471, 477, 823 P2d 1004 (1992). We are also unsure whether Clark can mandate deference when the local interpretation affects asserted constitutional rights, including federal rights. Like LUBA, however, we find it unnecessary to resolve what the standard of review is because, like LUBA, we would independently arrive at the same interpretation the city did: the remonstrance procedure, and the so-called nonremonstrance condition, affect only petitioners' right to be counted in the extraordinary majority that can abate the decision for six months; they do not limit petitioners' right to speak on the proposed district or any related matters, orally or in writing.

Consequently, as the city and the amicus argue, the nonremonstrance condition does not regulate speech, but simply makes a particular procedure unavailable to petitioners for delaying an action that they are free to express themselves about in any way. We agree with the city that its regulations and the condition do not restrict or regulate speech. Three of petitioners' four assignments fail for that reason. Petitioners' fourth assignment of error is that the nonremonstrance agreement "impairs voting rights." For the reasons discussed by LUBA, we do not find this argument persuasive.'

Affirmed.

FOOTNOTES

[1] The city's order also explained the purposes of the nonremonstrance requirement. In essence, it is an alternative to imposing a condition on particular developmental approvals that the individual applicant make any street improvements that the development necessitates. The objective is apparently to promote efficiency and to spread costs by having a district-wide improvement mechanism instead of requiring improvements in connection with each application. According to the city's uncontested finding, an applicant's acceptance of the nonremonstrance condition is shown "on the face of the nonremonstrance agreement" to be in consideration for the city's "waiver of the requirement for immediate construction." Petitioners do not appear to argue that the condition violates the Fifth Amendment or Article I, section 18.

[2] The concurring opinion correctly describes the narrow basis for our holding. Because that is the basis for our holding, however, it is unnecessary for us to reach, and we do not reach, the constitutional issue that the last sentence of the concurrence addresses.

HASELTON, J., concurring.

I write only to emphasize the narrow basis of our holding. The "nonremonstrance" condition at issue in this case referred to a specific procedure described in the city's code, and not to a general right to oppose governmental action. An attempt by a governmental body to condition receipt of a public benefit on waiver of such a general right to "remonstrate" would raise constitutional issues not presented here.

49.025 Interpretation, Regulations and Procedures.

The City Manager shall have the initial authority and responsibility to interpret all terms, provisions and requirements of this chapter. A request for an interpretation of this chapter shall be made in writing and may be appealed pursuant to the provisions of LOC 49.630. The City Manager may develop regulations and procedures to aid in the implementation and interpretation of the provisions of this chapter. (Ord. No. 1807, Sec. 1; 9-15-81.)

49.030 Fees and Deposits.

Fees and deposits for applications, plans reviews, inspections, appeals, transcripts or any other action pursuant to this chapter shall be established and adjusted by City Council resolution. (Ord. No. 1807, Sec. 1; 9-15-81.)

49.035 Enforcement.

It shall be the duty of the City Manager to enforce this chapter and to insure that conditions of approval of a development permit are properly carried out. (Ord. No. 1807, Sec. 1; 9-15-81.)

49.040 Penalties.

Any person who fails to comply with, or who violates, any provision of this chapter, or who fails to carry out the terms and conditions of any approval of development, shall be subject to a fine of not less than $50.00 or more than $500.00 per violation. Each day that the violation exists shall constitute a separate violation. Failure of City staff to comply with the time limits for

processing applications does not constitute a violation of this chapter. (Ord. No. 1807, Sec. 1; 9-15-81.)

(Rev. 8-18-92; bp) 280.10

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM LARSSON and DEBRA LARSSON,	)	LUBA No. 93-174
Petitioners,	)	FINAL OPINION AND ORDER
v.	)	
CITY OF LAKE OSWEGO,	)	
Respondent.	)	

Appeal from City of Lake Oswego.

Thomas H. Nelson, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Stoel Rives Boley Jones & Grey.

Jeffrey Condit, City Attorney, Lake Oswego, filed the response brief and argued on behalf of respondent.

KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

AFFIRMED 02/08/94

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the city council denying, in part, their request to modify conditions of approval for a previously approved partition.

FACTS

The subject property is a residential parcel located within the City of Lake Oswego. The challenged decision states the following additional facts:

> "The original minor partition * * * was approved by staff on April 16, 1990, as a 'minor development' pursuant to [Lake Oswego Code (LOC)] 49.140(1)(H). Minor developments are staff decisions, subject to notice and an opportunity to appeal. Staff imposed a number of conditions of approval on the partition pursuant to LOC 49.620, which allows the City to impose conditions or restrictions on any major or minor development approval in order to protect the public, implement the requirements of the Comprehensive Plan and [LOC] Chapter 49, and/or to fulfill a need for public services created or increased by the proposal. LOC 49.620(1)(A), (B) and (C). These conditions include [c]ondition 3, which required the applicants to sign a non-remonstrance agreement and petition for formation of a local improvement district (LID) for future street improvements along Iron Mountain Boulevard and Chandler Road; and [c]ondition 11, which required the applicants to post a cash deposit for the purpose of constructing a pathway along Iron Mountain Boulevard.

> The applicants did not appeal [the previous minor partition decision] and subsequently executed the non-remonstrance agreement and paid the pathway deposit. The partition was completed, the new parcel (parcel 2) was sold and a new dwelling was constructed on the new parcel during the summer of 1990. The applicants retained [the remainder of the original parcel (parcel 1)], which is occupied by a preexisting dwelling.
>
> "The applicants subsequently filed an application to modify the approved partition by deleting conditions 3 and 11 as applied to parcel 1. * * * Staff denied the request * * *. The applicants appealed the decision to the Development Review Board [(DRB)] pursuant to LOC 49.225, which held a de novo hearing and denied the modification * * *. Applicants then appealed the DRB's decision to the [City] Council." Record 9-10.

After a public hearing, the city council issued an order modifying the minor partition approval by deleting condition 11, but denying petitioners' request to delete condition 3.[1] This appeal followed.

INTRODUCTION

Most of petitioners' arguments are principally directed at deficiencies associated with the non-remonstrance agreement they executed with the city pursuant to condition 3. However, the proceedings below were, and indeed the challenged decision is, concerned solely with the question of whether condition 3 should be deleted from a prior, unappealed, city partition decision.

---

[1] The portion of the decision that deletes condition 11 is not challenged, and we do not consider it further.

Therefore, the only issue before us is whether the challenged city decision refusing to delete condition 3 is erroneous.[2]

The challenged decision states as follows:

> "* * * The [City] Council concludes that requiring an applicant for a partition to sign a non-remonstrance agreement to allow future improvement of a substandard City street is reasonably related to mitigating the impacts of the partition on that public facility, and is more practical and less onerous on the property owner than requiring immediate construction of a half-street improvement or denying all development which increases density or intensity of use until the street is improved." Record 18.

Petitioners do not challenge these findings.

In its brief for this appeal the city explains its understanding of what is not in dispute in this appeal proceeding:

> "[P]etitioners did not and do not contest any of the City's findings and conclusions as they relate to the evidence in the record or to the local code requirements. Based upon these uncontested findings and conclusions, the non-remonstrance agreement condition is directly related to mitigating the impact created by the partition and,

---

[2] That the agreement petitioners executed pursuant to condition 3 may or may not accurately reflect the requirements of condition 3 is an issue not before us in this appeal proceeding. Issues associated with the validity of the agreement itself may well arise if the city chooses to enforce the condition. However, the validity of the agreement is not presented in this appeal, and we do not consider it further.

therefore, more than survives scrutiny under [Parks v. Watson, 716 F2d 646 (9th Cir 1983)]." Respondent's Brief 26.

Similarly, we do not understand petitioners to contest that condition 3 is directly related to the city's original partition approval. Further, there is no contest that condition 3, together with other conditions of approval, was imposed as an alternative to denial of petitioners' original partition proposal. In this regard, there is no dispute the city could have required petitioners to construct their fair share of improvements to the substandard roadway on which the subject property fronts, instead of imposing condition 3.

FIRST ASSIGNMENT OF ERROR

"The non-remonstrance agreement violates the right to freedom of speech under the First Amendment to the U.S. Constitution."

SECOND ASSIGNMENT OF ERROR

"The non remonstrance agreement violates Article I, Section 8, of the Oregon Constitution."

THIRD ASSIGNMENT OF ERROR

"The city's conditioning the approval of a partition on petitioners' entering into a non-remonstrance agreement was illegal."

Disputed condition 3 provides:

> "The applicant[s] shall provide the City a signed agreement of non-remonstrance and petition for future street improvements anticipated in Iron Mountain Boulevard and Chandler Road. This agreement shall apply to all parcels approved and be binding on subsequent owners." Record 140.

There is no specific definition in the city code of the terms remonstrance or non-remonstrance. However, the challenged decision interprets remonstrance and non-remonstrance, in the context of condition 3, as follows:

> "* * * Lake Oswego Charter Article IX, Section 37 and LOC Chapter 40 govern formation of [limited improvement districts (LIDs)]. LOC 40.060 and 40.090 require two public hearings to be held: The first hearing is to determine whether the proposed LID should be formed, draw the appropriate boundaries of the LID, determine the appropriate assessment formula and set the appropriate interest rate. The second hearing is to hear objections to the amount of the assessment. LOC 40.050(1) authorizes affected property owners to file written remonstrances objecting to formation of the LID at the time of the first hearing. If written remonstrances are received from at least two-thirds of the property owners, formation of the LID is suspended for 6 months. A non-remonstrance agreement waives the property owner's right to file a written remonstrance and thereby potentially delay the project for six months.
>
> "LOC 40.050(2), however, expressly authorizes and requires the [City] Council to consider oral objections to the project at the first hearing. LOC 40.040 expressly requires the published notice to state that oral objections

> will be considered at the public hearing. LOC 40.060(2) expressly requires the [City] Council to consider any testimony in addition to written remonstrances in deciding whether to proceed with formation of the LID. LOC 40.080(2) and 40.090 notifies and allows 'all persons' to testify in objection to the proposed assessments at the second hearing. Regardless of whether a person has waived his or her right to delay the project in a non-remonstrance agreement, such persons are notified of their right to appear, and may appear, before the Council at the first and second public hearings and object or otherwise testify regarding the LID on the merits. Based upon this express language, the [City] Council concludes that the non-remonstrance agreement condition does not limit the applicants' right to speak on any issue or to seek redress of grievances from the [City] Council in violation of the [Oregon and United States Constitutions]." (Emphasis supplied.) Record 14-15.

Petitioners advance a number of reasons why they believe condition 3 is unconstitutional. Essentially, petitioners contend condition 3 is impermissibly vague and violates their right to free expression under the First Amendment to the United States Constitution and Article I, section 8, of the Oregon Constitution. We address these contentions below.

A. Vagueness and Overbreadth

1. Introduction

Petitioners contend condition 3 is impermissibly vague and overbroad under both the United States and Oregon constitutions. The legal analysis applied to vagueness and overbreadth challenges under both the United States and Oregon constitutions are

essentially the same. See State v. Plowman, 314 Or 157, 162, 838 P2d 558 (1992) (vagueness); City of Hillsboro v. Purcell, 306 Or 547, 556 n 8, 761 P2d 510 (1988) (overbreadth). The most significant difference between the legal analysis applied to claims concerning restrictions on free expression under the First Amendment to the United States Constitution and claims under Article I, section 8, of the Oregon Constitution has to do with the merits of such claims, not with whether the restricting law is vague or overbroad. Article I, section 8, of the Oregon Constitution permits no direct limitation on the exercise of free expression, whereas the First Amendment to the United States Constitution permits some limitations on certain classes of speech, i.e. obscenity and commercial speech. Compare State v. Robertson, 293 Or 402, 435, 649 P2d 569 (1982); Tidyman v. City of Portland, 306 Or 174, 759 P2d 242 (1988), with Metromedia Inc v. San Diego, 453 US 490, 101 S Ct 2882, 69 L Ed2d 800 (1981); Young v. American Mini Theaters, 427 US 50, 96 S Ct 2440, 49 L Ed2d 310 (1976); see also Lehman v. City of Shaker Heights, 418 US 298, 94 S Ct 2714, 41 L Ed2d 770 (1974). We address petitioners' vagueness and overbreadth challenges before addressing the merits of their constitutional claims.

2. Vagueness

Because the terms remonstrance and non-remonstrance are not defined in either the city code or the challenged condition, condition 3 is ambiguous. However, the fact that condition 3 contains an ambiguous term does not, of itself, establish that condition 3 is unconstitutionally vague. See State v. Plowman, supra, 314 Or at 160 (a reasonable degree of certainty about the kind of conduct falling within a statute's prohibition is required; but absolute certainty is not). Clearly, regulations purporting to limit "speech" are vulnerable to vagueness challenges. See State v. Henry, 78 Or App 392, 396, 712 P2d 189, rev'd 302 Or 510 (1987). However,

some ambiguity is allowed where the ambiguous language is circumscribed by reference to specific, non-vague regulations. See Juv. Dept. v. D, 27 Or App 861, 866, 557 P2d 687 (1976). In the instant case, Condition 3 is circumscribed by relatively clear LOC regulations.

In Davidson v. Oregon Government Ethics Comm., 300 Or 415, 425, 712 P2d 87 (1985), a public official challenged an ethics statute under which he had been prosecuted for civil violations. In determining the ethics statute was not vague, the court observed:

> "The rule against vagueness does not invalidate every law that leaves room for two or more interpretations on which legislators, lawyers and courts may differ; most laws do. Nor does any rule require that one must be able to predict with certainty the application of the law to every hypothetical set of facts. * * *" Id.

After reviewing controlling authorities, we believe the vagueness issue presented here may be framed as whether reasonable applicants can understand what they must do to comply with condition 3. See Anderson v. Peden, 284 Or 313, 324, 587 P2d 59 (1978); Oswego Properties, Inc. v. City of Lake Oswego, 108 Or App 113, 814 P2d 539 (1991); Lee v. City of Portland, 57 Or App 798, 646 P2d 662; ORS 227.173(1).

The city has specifically interpreted condition 3. Where the interpretative question centers on a local government's interpretation of its prior decision, we have previously said that, under the Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), standard of review, we must defer to such an interpretation. This is because it is a local government interpretation of locally adopted "applicable law." Perry v. Yamhill County, ____ Or LUBA ____

(LUBA No. 93-072, October 7, 1993), slip op 10, aff'd 125 Or App 588 (1993). However, ORS 197.829, which became effective November 4, 1993, may have changed this requirement that LUBA defer to local interpretations of prior local decisions. Under ORS 197.829, LUBA is required to defer to a local government's interpretation of "its comprehensive plan and land use regulations * * *." ORS 197.829 does not specifically require that LUBA defer to local interpretations of prior local decisions. Consequently, it is unclear under ORS 197.829, whether LUBA is to defer to a local government's interpretation of a prior decision or whether LUBA is required to determine whether the local government interpretation of a prior decision is reasonable and correct. See McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988).

In this appeal, however, we need not determine whether ORS 197.829 changes our scope of review of local government interpretations of prior decisions. As we explain below, the city's interpretation is a reasonable and correct interpretation of the LOC provisions governing the formation of LIDs and, therefore, of condition 3. Thus, we would uphold the city's interpretation of condition 3 regardless of the degree of deference owed to that interpretation.[3]

The only references to the term "remonstrance" in the LOC provisions governing the formation of LIDs refer to a specific kind of written objection, required to be filed with a particular person, in a particular manner, within a particular period of time. LOC 40.050. LOC 40.050(1) specifically distinguishes between written

---

[3] We also note we must adopt a constitutional interpretation of local law over an interpretation that renders the local law unconstitutional, and that "[u]nconstitutionality is not to be presumed." Miotke v. Gladden, 250 Or 466, 468, 443 P2d 612 (1968).

remonstrances and oral objections. LOC 40.050(1) requires written remonstrances be filed with the city recorder by the "close of the business day of the hearing." Oral comments at the public hearings concerning the formation of LIDs are uniformly referred to in the LOC as oral objections. Further, there is a specific consequence associated with the filing of remonstrances by a 2/3 majority of the affected property owners--an LID proposal is suspended for a period of six months.

We agree with the city that the terms of condition 3 are clear enough for petitioners to understand what is expected of them. Read in context with the LOC Chapter 40 provisions condition 3 is designed to implement, petitioners are required to execute an agreement that they will not file a LOC 40.050(1) remonstrance with the city recorder. We also conclude it is sufficiently clear that condition 3 does not purport to limit petitioners' presentation of oral objections at public hearings on the LIDs, or to prevent petitioners from making any other form of written objection to a proposed LID, other than a remonstrance under LOC 40.050(1).

Condition 3 is not impermissibly vague.

This subassignment of error is denied.

3. Overbreadth

Petitioners claim condition 3 is overbroad. Overbreadth in this context refers to legislative action having a sweep so broad that it unreasonably limits constitutionally protected activity. Broadrick v. Oklahoma, 413 US 600, 93 S Ct 2908, 2916, 2918, 37 L Ed2d 830 (1973). An overbroad law is one which is not "limited to and contained by the consequences the law seeks to prevent." City of Hillsboro v. Purcell, supra, 306 Or at 556; see

also State v. Plowman, supra, 314 Or at 164, and cases cited thereat.

We note at the outset that it is difficult to apply the overbreadth doctrine to a quasi-judicial decision interpreting a previously imposed condition of approval. It may be that petitioners mean to allege the LID provisions in the city code are themselves overbroad. However, if this is their claim, we believe petitioners should have made such a claim in an appeal of the city's original partition decision. This is because here, the challenged decision purports to justify only the existence of condition 3 on the basis of its LOC provisions relating to LIDs. We do not understand the city's decision to have opened the door for a general inquiry into whether the city's LID provisions are facially unconstitutional.

In any case, we do not believe either condition 3, or the LID provisions condition 3 implements, are overbroad under either the United States or Oregon Constitutions. In Broadrick v. Oklahoma, supra, 93 S Ct at 2918, the United States Supreme Court stated the following with regard to the overbreadth doctrine:

> "* * * Application of the overbreadth doctrine * * * is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.
>
> "* * * * *
>
> "[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that [the disputed statute] is not substantially overbroad and

> that whatever overbreadth may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." (Citations omitted.)

Here, petitioners have not established the challenged decision does anything that gives condition 3 a "sweep" that substantially exceeds the boundaries of legitimate government regulation. In this regard, it is critical that petitioners do not challenge the city's findings that condition 3 is "reasonably related to mitigating the impacts of the partition" on the substandard city street on which both parcel 1 and parcel 2 front. Record 18. Finally, petitioners have not established the limiting construction the city placed on both its LOC LID provisions and condition 3 is inadequate to avoid claims that condition 3 is overbroad.

This subassignment of error is denied.

B. Freedom of Expression

Petitioners argue condition 3 unconstitutionally requires relinquishment of their constitutionally protected rights to address their government and object to a proposed LID. Petitioners characterize this as an infringement upon their rights to political speech.

We determine above the only limitation condition 3 imposes is that petitioners may not file remonstrances against the formation of certain LIDs; meaning petitioners may not avail themselves of a specific process that under some circumstances will result in a six month suspension of the proposal to form a LID. Stated another way, condition 3 simply states that in exchange for a partition approval, to which petitioners would not otherwise be entitled, petitioners must agree not to file remonstrances against

the formation of certain street improvement LIDs with the city recorder under LOC 40.050(1). Condition 3 does not forbid petitioners from filing any other written objection with the city concerning a proposed LID or from testifying at public hearings on such a proposal.

1. First Amendment

The First Amendment to the United States Constitution proscribes laws:

> "* * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. Nature of Condition 3

The United States Supreme Court has stated the guarantee of free expression embodied in the First Amendment prohibits:

> "[A]ny action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. * * *" Bigelow v. Virginia, 421 US 809, 829, 95 S Ct 222, 44 L Ed2d 600 (1975)

The United States Supreme Court has noted in First Amendment cases that it is important to distinguish between governmental compulsion and conditions relating to governmental benefits. Boden v. Roy, 476 US 693, 705, 106 S Ct 2147, 2155, 90 L Ed2d 735 (1986); see Blackwell v. City of St. Charles, 726 F Supp 256, aff'd 917 F2d 1150 (8th Cir 1990). Condition 3 falls into the latter category. This is because conditions related to the acquisition of governmental benefits, even those that may impinge

on a constitutionally protected right such as expression, are permissible if there is a legitimate governmental purpose advanced by the condition, and the governmental benefit is not one to which the person is legally entitled. Boden v. Roy, supra; Blackwell v. City of St. Charles, supra.

In Parks v. Watson, supra, 716 F2d at 653, the court stated that:

> "[C]onditions requiring the relinquishment of a constitutional right have been upheld when the condition was related to a benefit conferred."

In Parks, the court invalidated a condition of approval because it was unrelated to the benefit conferred. Here, there is no challenge to the city's findings that condition 3 is directly related to the impact created by the approved partition. Further, the city correctly states in its brief:

> "[Petitioners] could have avoided [condition 3] by building a one-half street improvement but chose not to pursue that option." Respondent's Brief 3.

Condition 3 is remarkably similar to a condition of annexation approval analyzed by the Washington Court of Appeals in Five Mile Prairie v. City of Spokane, 51 Wash App 816, 755 P2d 836 (1988). In Five Mile Prairie, the court determined a city condition requiring land owners to support an annexation proposal was not an unconstitutional infringement on the land owners' First Amendment free expression guarantees. It was persuasive to the court in Five Mile Prairie that (1) the annexation support condition was clear, (2) the condition was not coerced, and (3) the land owners were given an opportunity to voice their opposition to the annexation proposal, in any event.

Similarly, here the terms of condition 3 are reasonably clear when read in the context of the LOC provisions the condition implements. Further, there is no evidence the city coerced petitioners to accept condition 3. Petitioners had at least three options, and they chose condition 3. Those options included (1) accepting denial of their partition application or appealing a denial decision, (2) paying for a one-half street improvement before partitioning the property, and (3) accepting condition 3. Petitioners accepted condition 3, partitioned their property, accepted the benefits of that partition by selling the partitioned piece and retaining the remainder, and then requested relief from condition 3. This is a far cry from establishing that petitioners were coerced into accepting condition 3. Finally, under condition 3 petitioners are given ample opportunity to object to the proposed formation of an LID. They simply cannot avail themselves of a remonstrance under LOC 40.050(1).

Another case provides analytical guidance on the validity of condition 3. In Blackwell v. City of St. Charles, supra, a city required as a condition of water and sewer hookup approval that affected landowners sign a petition for voluntary annexation. The landowners challenged the condition as an unconstitutional restriction on their rights to free expression. The court in Blackwell v. City of St. Charles, supra, 726 F Supp at 258 (1989), determined the condition did not violate the First Amendment as follows:

> "Plaintiffs' first amendment claim is without merit. * * * First, the Court finds plaintiffs' characterization of the required assent to annexation as compelled political speech to be rather strained. The signing of the petition is not a 'compulsion to declare a belief,' nor a communication of ideas, nor 'a symbol of adherence to

government as presently organized,' nor an acceptance of political ideas; it does not require 'affirmation of a belief and an attitude of mind.' * * *

"Second, even if the political speech characterization is accepted, the first amendment is not implicated by a rational requirement of assent to a particular proposition in order to obtain a benefit to which the would-be recipient has no legal entitlement. In the freedom of religion context, the Supreme Court has noted the importance of the distinction between governmental compulsion and conditions relating to governmental benefits. * * * The same distinction is applicable in the sister first amendment context of free speech.

"Furthermore, only in the governmental compulsion context would the 'least restrictive means' test, on which plaintiffs rely, come into play. Here, [the city] meets its burden when it demonstrates that the challenged requirement 'is a reasonable means of promoting a legitimate public interest.' * * * The distinction between governmental compulsion and conditions relating to governmental benefits, and the corresponding difference in the government's burden to justify the challenged practice, preclude relief for plaintiffs on first amendment grounds.

"The consent to annexation requirement is not compulsory in the constitutional sense. It is 'forced' upon plaintiffs only in the sense that it is a contract term which they must accept in order to obtain the city's agreement to provide them with water. Conversely, plaintiffs may reject the required assent as too high a price for the benefit they seek. * * * [I]t is a 'government regulation that indirectly and incidentally calls for a choice between

> securing a governmental benefit and adherence to [political preferences].'" (Emphasis supplied; citations omitted.)

We conclude condition 3 does not impermissibly infringe on petitioners' rights to freedom of expression guaranteed by the First Amendment to the United States Constitution. Nothing about condition 3 allows or requires the city to disregard petitioners' political views about LIDs. Condition 3 limits one method for objecting to the formation of a LID, but leaves petitioners free to object to a proposed LID in a variety of other ways.

Further, as stated above, there is no evidence of coercion in the imposition of condition 3. Nothing indicates condition 3 is not the result of an arms-length transaction between the city and petitioners. Petitioners do not dispute they received a benefit from the city as a result of that transaction (approval of the partition of their property). Clearly, part of that benefit included not immediately having to contribute funds to improve the substandard street upon which the subject property fronts, or to improve that part of the street themselves.

The First Amendment does not forbid the city from imposing condition 3 in the circumstances presented here.

b. Waiver

In the alternative, to the extent condition 3 may offend the First Amendment (although we do not believe it does), we believe the circumstances presented here establish that petitioners waived any First Amendment protection.

Cases demonstrate the First Amendment does not forbid the waiver or relinquishment of what is otherwise a constitutionally

protected right in the circumstances presented here, so long as the waiver is voluntary and knowing. Leonard v. Clark, 758 F Supp 616, 619 (DC Or 1991), provides a legal analysis relevant to determining the validity of condition 3.[4] In Leonard, a union entered into a collective bargaining agreement restricting the union's ability to endorse and sponsor legislative issues involving benefit improvements that could result in higher payroll costs for the city. The court described the following factors as relevant in determining the validity of a contractual waiver of a First Amendment right:

> "[T]he United States Supreme Court outlined the factors to be considered in determining whether there has been a valid contractual waiver of a constitutionally guaranteed right. These factors were summarized by the Third Circuit Court of Appeals in Erie Telecommunications, Inc. v. City of Erie, Pa., 853 F.2d 1084, 1097 (3rd Cir. 1988). In Erie, the court held that a party is deemed to have voluntarily waived its constitutional rights through a contract where 1) the parties to the contract have bargaining equality; 2) the parties have negotiated the terms of the contract; and 3) the waiving party is advised by competent counsel and has engaged in other contract negotiations." Leonard, supra.

We conclude condition 3 was voluntarily accepted by petitioners as an alternative to having to make current expenditures of money toward the street improvements condition 3 furthers, or to having their original partition application denied. The circum-

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[4] Although Leonard involves a contract waiver of constitutionally protected speech rights, and not a condition of approval adopted in a quasi-judicial decision as is the case here, we believe the principles expressed by the court in Leonard are analytically relevant.

stances establish petitioners knew exactly what they were giving up when they accepted condition 3, and failed to take advantage of reasonable opportunities to object to the condition, i.e. by filing an appeal.[5] Therefore, with regard to condition 3, petitioners have waived their First Amendment rights.

This subassignment of error is denied.

2. Article I, Section 8

Article I, section 8, of the Oregon Constitution provides:

> "No law shall be passed restraining free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for abuse of this right."

a. Nature of Condition 3

There are essentially three lines of cases dealing with the scope of the prohibition on laws restricting freedom of expression established by Article I, section 8. None are dispositive in the circumstances presented here, but all provide legal principles relevant to assisting the analysis of whether condition 3 constitutes an impermissible limitation on petitioners' rights under Article I, section 8.

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[5] We note that it is unclear whether petitioners were represented by legal counsel during the city proceeding leading to the original partition approval decision. However, the original partition decision was made at the city staff level. Therefore, in any event, it is unlikely the city had the benefit of legal counsel.

The first line of cases involves criminal laws that directly or indirectly restrict the content of expression. Compare State v. Robertson, supra (criminal laws punishing certain expressive conduct are unlawful under Article I, section 8), with State v. Plowman, supra (criminal intimidation law is not invalid as it punishes only forbidden effects of expressive conduct). In State v. Plowman, the court determined that an element of criminal intimidation requiring action based on the actor's "perception of the victim's race, color, religion, national origin, or sexual orientation," did not proscribe Article I, section 8 rights to free expression, but rather prohibited unlawful effects. The court explained the distinction in this way:

> "* * * One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person because of that person's perceived membership in the hated group. * * *" State v. Plowman, supra, 314 Or at 165.

The second line of cases deals with the kinds of constitutionally permissible remedies available for abuse of the right to free expression. Wheeler v. Green, 286 Or 99, 119, 593 P2d 777 (1979) (punitive damages in defamation cases are unconstitutional under Article I, section 8, because they can "easily inhibit the exercise of freedom of constitutionally protected expression * * *"); see also Huffman and Wright Logging Company v. Wade, 317 Or 445, 458-59, _____ P2d _____ (1993) (Article I, section 8 does not prevent the award of punitive damages for the tort of trespass despite the fact that such damages may incidentally punish those who protest against logging practices); Hall v. The May Dept. Stores, 292 Or 131, 145-47, 637 P2d 126 (1981).

The final line of cases deals with the enactment or application of civil laws which have the effect of directly or indirectly limiting expressive rights. Under these cases, laws that directly and absolutely prohibit expressive conduct rather than forbidden effects are invalid under Article I, section 8. Tidyman v. City of Portland, supra. On the other hand, laws which may have an indirect effect of limiting expression are permissible so long as they are reasonably related to a legitimate governmental purpose and are reasonable in scope. See Davidson v. Oregon Government Ethics Comm., supra. In this regard, the court in Tidyman, supra, 306 Or at 183, observed:

> "A regulation is not always unconstitutional because it restricts one's choice of a place or time for self-expression * * * when that is not the object of the regulation. The concern may be with the medium, not the message, as when park regulations ban fireworks even for a Fourth of July celebration. To decline an exception from a land-use regulation for a theater, a printing plant or a church differs from attempting to restrict prayer meetings, film showings or desk-top publishing in a residence, or in turn enforcing safety codes or parking regulations when a residence is so used. * * * This court has never held that an otherwise valid restriction must cover all or nothing * * *."

Under these authorities, it is clear Article I, section 8 forbids passage of any law absolutely and directly restraining free expression.[6] State v. Robertson, supra; Ackerly Communications,

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[6] It appears the strict prohibition in Article I, section 8 refers only to the passage of laws, i.e. legislative enactments, and does not answer the question presented here concerning conditions of approval in quasi-

(continued...)

Inc. v. Mult. Co., 72 Or App 617, 696 P2d 1140 (1985). However, the line between regulations absolutely and directly restraining free expression and those proscribing only prohibited effects is not bright. See State v. Plowman, supra; Huffman and Wright Logging Company v. Wade, supra. It is also clear that reasonable regulations limiting the manner of the exercise of free expression are valid under Article I, section 8. Tidyman v. City of Portland, supra; State v. Henry, 302 Or 510, 525, 732 P2d 9 (1987); State ex rel Oregonian Pub. Co. v. Deiz, 289 Or 277, 287, 613 P2d 23 (1980).

At the outset, we note condition 3 does not fit neatly into the category of a reasonable regulation limiting the manner of speech. Neither does condition 3 fit neatly into the category of a regulation proscribing impermissible effects of free expression. However, condition 3 also does not fit neatly into the category of an outright prohibition on the content of expression. Therefore, we must determine which type of regulation condition 3 most resembles.

We state above that condition 3 does no more than limit the manner of exercise of petitioners' rights to oppose an LID, and that petitioners are only prohibited from submitting an LOC 40.050(1) remonstrance potentially suspending action on an LID for six months. Petitioners are free, however, to oppose an LID by other forms of written communication or by presenting

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[6](...continued)
judicial land use decisions. While a quasi-judicial decision certainly results in the adoption of local law applicable to a particular piece of property, it is unclear how such a decision fits into the prohibition stated in Article I, section 8. In any event, for purposes of resolving this assignment of error, we assume without deciding that Article I, section 8 potentially limits the authority of the city to impose a condition of approval such as condition 3.

testimony at city LID hearings. Therefore, we conclude that condition 3 is most analogous to a reasonable limitation on the manner of the exercise of petitioners' right to free expression. Such a limitation does not violate Article I, section 8.

This subassignment of error is denied.

b. Waiver

To the extent we may be incorrect in concluding that condition 3 does not offend Article I, section 8, we consider in the alternative whether petitioners waived their rights under Article I, section 8.

In Oregon, waiver is uniformly held to be the "relinquishment of a known right." In re Jordan, 290 Or 669, 672-73, 624 P2d 1074 (1981); see Drews v. EBI Companies, 310 Or 134, 150, 795 P2d 531 (1993); see also Lyons v. Pearce, 298 Or 554, 560-63, 694 P2d 969 (1985). In Carrier v. Hicks, 316 Or 341, 352, ___ P2d ____ (1993), the court held the fact that a complainant voluntarily entered into arbitration pursuant to ORS 742.504(1), instead of demanding a jury trial of an uninsured motorist claim, was enough to constitute a voluntary waiver of the constitutionally guaranteed right to jury trial. Accord Mazorol v. Coats, 316 Or 367, ____ P2d ____ (1993). From Carrier v. Hicks, it appears the waiver threshold for constitutional rights is a relatively easy one to cross. Therefore, even if condition 3 can be read to be an absolute prohibition on petitioners' rights under Article I, section 8, we are persuaded that the circumstances described in the preceding sections clearly demonstrate that petitioners voluntarily and knowingly waived the right to file a LOC 40.050(1) remonstrance in exchange for the partition approval. See Leonard v. Clark, supra.

This subassignment of error is denied.

3. Conclusion

Petitioners have not established how condition 3 violates either the First Amendment to the United States Constitution or Article I, section 8, of the Oregon Constitution, and we do not see that it does. In addition, even if condition 3 offends those constitutional provisions, petitioners have failed to establish they have not waived those rights.

The first, second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

"The non remonstrance agreement impairs voting rights."

Petitioners argue condition 3 violates ORS 260.665(2)(a) through (c), which prohibits "undue influence" on a person either not to vote at all or to vote in a particular manner.

There are several reasons why this assignment of error provides no basis for reversal or remand of the challenged decision. We address two of them.

First, we state above the city exercised no "undue influence" over petitioners in imposing condition 3. Second, under condition 3, petitioners are neither prevented from voting nor required to vote in any particular manner on a proposed LID. As we state above, the limitation imposed by condition 3 is very narrow. Petitioners simply may not pursue a remonstrance against the formation of an LID under LOC 40.050(1), but are free to participate in the city's LID process in all other respects.

The fourth assignment of error is denied.

The city's decision is affirmed.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 93-174, on February 8, 1994, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Thomas H. Nelson
Stoel, Rives, et al
900 SW Fifth Avenue, Suite 2300
Portland, OR 97204

Jeffrey Condit
City Attorney
PO Box 369
Lake Oswego, OR 97034

Dated this 8th day of February, 1994.

Jan Zwemke
Office Manager

BEFORE THE CITY COUNCIL
OF THE CITY OF LAKE OSWEGO

AN APPEAL OF SD 56-89	)	
(Mod. 7-92) /AP 93-01-1002,	)	AP 93-05-1025
A DEVELOPMENT REVIEW	)	(William and Debra Larsson)
BOARD DENIAL OF A	)	FINDINGS, CONCLUSIONS
REQUEST TO MODIFY AN	)	& ORDER
APPROVED MINOR PARTI-	)	
TION BY ELIMINATING	)	
TWO CONDITIONS OF	)	
APPROVAL	)	

NATURE OF APPEAL

This proceeding is an appeal by William and Debra Larsson (appellants) of a decision of the Development Review Board (DRB). The applicant is seeking to modify an earlier partition approval (SD 56-89) which enabled the creation of two parcels from an 86,058 square foot lot. The parcels created are 20,078 and 65,980 square feet in size. The applicant seeks the elimination of two conditions of approval (Conditions Number 3 and 11) as they regard Tax Lot 3400 (Parcel 1). The site is located at the southwest corner of intersection of Chandler Road and Iron Mountain Blvd. (Tax Lot 3400 of Tax Map 2 1E 3CC).

HEARINGS

The Development Review Board held a public hearing and considered this application at its meetings of April 5 and 19, 1993. The City Council held a public hearing and considered the appeal at its regular meeting of September 7, 1993.

CRITERIA AND STANDARDS

A. City of Lake Oswego Comprehensive Plan:

Urban Service Boundary Policies
General Policy III, Specific Policy 4

Impact Management Policies
General Policy I, Specific Policy 1
General Policy II, Specific Policy 1,2,3
General Policy III, Specific Policy 1

Residential Site Design Policies
General Policy IV, Specific Policy 2,3
General Policy V, Specific Policy 1

Bikeway Policies
General Policy I, Specific Policy 2,3,6

Pedestrian Pathways Policies
General Policy II, Specific Policy 1

Transportation Policies
General Policy II, Specific Policy 1
General Policy IV, Specific Policy 7
General Policy VI, Specific Policy 3

B. City of Lake Oswego Zoning Ordinance:

LOC 48.015	Definitions
LOC 48.195-48.225	R-10 Zone Description (set-backs, lot area, lot coverage)
LOC 48.535(3)	Special Street Setbacks
LOC 48.820	Restrictions and Conditions

C. City of Lake Oswego Development Code:

LOC 49.015(36)	Definition; Public Facilities
LOC 49.090	Applicability of Development Standards
LOC 49.125	Authority to Approve Changes in Development Permits
LOC 49.140	Minor Development
LOC 49.200-49.210	Minor Development Procedures
LOC 49.215	Authority of City Manager
LOC 49.225	Appeals
LOC 49.615	Criteria for Approval
LOC 49.620	Conditional Approvals
LOC 49.630	Appeals of City Manager Action

D. City of Lake Oswego Development Standards:

14.005 - 14.040	Utility Standard

E. City of Lake Oswego Pathways:

LOC 42.900 - 42.920
LOC 44.374

CONCLUSION

The City Council heard the testimony of the appellants and reviewed the record made before it and the DRB, and affirms the DRB's decision to retain condition 3, which imposed a non-remonstrance agreement to formation of a future LID for street improvements along Iron Mountain Boulevard and Chandler Road, and modifies the DRB's decision by deleting the condition 11, which imposed a bikeway deposit for construction of a bikeway along Iron Mountain Boulevard.

FINDINGS AND REASONS

The City Council incorporates the April 5 and April 19, 1993, staff reports and the record established during the public hearings before the DRB and the City Council, as support for its decision. In addition, the Council finds as follows:

1. The original minor partition (SD 56-89) was approved by staff on April 16, 1990, as a "minor development" pursuant to LOC 49.140(1)(H). Minor developments are staff decisions, subject to notice and the opportunity to appeal. Staff imposed a number of conditions of approval on the partition pursuant to LOC 49.620, which allows the City to impose conditions or restrictions on any major or minor development approval in order to protect the public, implement the requirements of the Comprehensive Plan and Chapter 49, and/or to fulfill a need for public services created or increased by the proposal. LOC 49.620(1)(A), (B) and (C). These conditions include: Condition 3, which

required the applicants to sign a non-remonstrance agreement and petition for formation of a local improvement district (LID) for future street improvements along Iron Mountain Boulevard and Chandler Road; and Condition 11, which required the applicants to post a cash deposit for the purpose of constructing a pathway along Iron Mountain Boulevard. The applicants did not appeal SD 89-56, and subsequently executed the non-remonstrance agreement and paid the pathway deposit. The partition was completed, the new parcel (parcel 2) was sold, and a new dwelling was constructed on the new parcel during the summer of 1990. The applicants retained parcel 1, which is occupied by a pre-existing dwelling.

The applicants subsequently filed an application to modify the approved partition by deleting conditions 3 and 11 as applied to Parcel 1. The application was filed pursuant to LOC 49.125. Staff denied the request on January 15, 1993. The applicants appealed the decision to the Development Review Board pursuant to LOC 49.225, which held a de novo hearing and denied the modification on April 19, 1993. Applicants then appealed the DRB's decision to the Council.

2. As noted in the staff report, the non-remonstrance agreement was imposed pursuant to a number of Comprehensive Plan, Development Code and the Development Standard policies and criteria. Specific Policy 4 of General Policy III of the Urban Service Boundary Policy of the Comprehensive Plan requires all new development to be served by an urban level of services, including adequate streets, and requires such facilities to be available or committed to prior to approval of development. In addition, several of the impact management policies cited in the staff report require new development to pay for or ameliorate

impacts to public facilities relating to the development. These policies are implemented pursuant to LODS 14.020(1), which requires all major and minor developments to provide public utilities, including streets [LODS 14.020(1)(h)], to City Standards. The applicants did not contest either the applicability or staff's interpretation of these provisions. The Council concludes that the staff correctly applied and interpreted these provisions.

As noted in the staff report, neither Chandler Road nor Iron Mountain Boulevard meets current City standards in regard to required width, curbs, gutters, storm drainage, sidewalks and pathways. Staff found that the proposed partition would increase use of these streets by increasing the density of development, and therefore would contribute to the need for eventual improvement of the streets. The applicants have the burden of proof pursuant to LOC 49.615(1); they do not contest these findings or conclusions. Based upon the Staff Report the Council concludes that these findings are correct.

Based upon these findings of fact, Staff determined that construction of the road to City standards, or imposition of a condition to ensure future construction of the road to City standards, was necessary to ensure compliance with LODS 14.020 and the applicable Comprehensive Plan Policies and that a condition was therefore authorized by LOC 49.620(1)(B) and (1)(C). Council concurs with this interpretation and application of these provisions.

In reviewing a partition for compliance with these provisions, the Council concludes that the City essentially has three choices: Require the developer to improve half of the substandard street abutting the property to City standards prior to final approval of the partition; require the developer to sign a

non-remonstrance agreement so that the City can be assured of improving the entire street at such time as incremental development makes it necessary; or deny the partition and thereby avoid any additional impact on public facilities. At this point, the Council cannot deny or revoke the partition because the application gives the City jurisdiction over only one of the two lots created pursuant to the original partition and because the additional development which impacts the street has already occurred on the second lot.

As noted in the City Attorney's memorandum in the record, the City typically requires a developer of one or two lots to sign a non-remonstrance agreement to formation of an LID for street improvement, rather than requiring immediate improvement of the street frontage as a condition of development. Such a condition is imposed because it is neither cost effective nor good engineering to construct a half street section abutting just a few lots, and because the impact of such small scale development may not create an immediate need to improve the entire street, even though each such development contributes to creating a future need. Requiring a non-remonstrance agreement allows the City to form an LID, improve the entire road and assess the cost to the benefitted properties at such time as the cumulative impact of such lot by lot development triggers the need to do so. It is made clear on the face of the non-remonstrance agreement, however, that the consideration for the applicants' agreement is the City's waiver of the requirement for immediate construction. For these reasons, the Council concludes that imposing such a condition is more a practical, reasonable and beneficial method for complying with LODS 14.020, LOC 49.620(1) and the Comprehensive Plan than

imposing a condition requiring immediate partial construction or denying the development for failure to comply with LODS 14.020.

The applicants do not contest these findings or rationale; rather, they argue that non-remonstrance agreement is illegal and unconstitutional.

Applicants' primary argument is that the agreement deprives them, or chills their exercise of, free speech and the right to petition government for redress of grievances under Oregon Constitution Article I, Section 8 and Article I, Section 26, and under the first and First and Fourteenth Amendments of the U.S. Constitution, because it prevents them from objecting to the formation of an LID.

The Council disagrees. Lake Oswego Charter Article IX, Section 37 and LOC Chapter 40 govern formation of LIDS. LOC 40.060 and 40.090 require two public hearings to be held: The first hearing is to determine whether the proposed LID should be formed, draw the appropriate boundaries of the LID, determine the appropriate assessment formula and set the appropriate interest rate. The second hearing is to hear objections to the amount of the assessment. LOC 40.050(1) authorizes affected property owners to file written remonstrances objecting to formation of the LID at the time of the first hearing. If written remonstrances are received from at least two-thirds of the property owners, formation of the LID is suspended for six months. A non-remonstrance agreement waives the property owner's right to file a written remonstrance and thereby potentially delay the project for six months.

LOC 40.050(2), however, expressly authorizes and requires the Council to consider oral objections to the project at

the first hearing. LOC 40.040 expressly requires the published notice to state that oral objections will be considered at the public hearing. LOC 40.060(2) expressly requires the Council to consider any testimony in addition to written remonstrances in deciding whether to proceed with formation of the LID. LOC 40.080(2) and 40.090 notifies and allows "all persons" to testify in objection to the proposed assessments at the second hearing. Regardless of whether a person has waived his or her right to delay the project in a non-remonstrance agreement, such persons are notified of their right to appear, and may appear, before the Council at the first and second public hearings and object to or otherwise testify regarding the LID on the merits. Based upon this express language, the Council concludes that the non-remonstrance agreement condition does not limit the applicants' right to speak on any issue or to seek redress of grievances from the Council in violation of the constitutional provisions cited above.

Applicants alternatively argue that by requiring them to waive their right to delay an LID, the Council is illegally and unconstitutionally requiring them to give up their right to vote in violating of Oregon Constitution Article II Section 1 and 42 USC Section 1502(a)(1), 5 USC Section 1502(a)(1) (The Hatch Act) and ORS 260.665 (the Oregon Corrupt Practices Act). The applicants failed to cite any case law or provisions which would indicate that the ability of a property owner to file a written remonstrance to formation of an LID is an "election" or a "vote" subject to these laws. Based on the advice of the City Attorney, the Council concludes that it is not.

Applicants further argue that the Council can not condition approval of a development permit on the surrender of a

legal right. As noted above, the Council disagrees that any fundamental constitutional right is involved. The right to remonstrate and thereby delay formation of an LID is entirely a creature of the City Charter and Code. The applicants voluntarily applied to the City to partition their property, thereby subjecting their property and proposal to the City land use planning jurisdiction. The applicants could have walked away from the partition rather than sign the non-remonstrance agreement, or could have appealed the condition or asked to be allowed to construct the half-street improvement instead. They did not do so. Instead, they signed the agreement and proceeded with the partition, thereby obtaining a benefit under the City Code and placing an additional burden on the City infrastructure. The City is expressly authorized by LOC 49.620(1)(B) to condition approval by requiring the applicant to alleviate such burdens. The Council concludes that conditioning a permit on the signing of a non-remonstrance agreement is not fundamentally different from conditioning a permit on payment of an impact fee, dedication of a right-of-way, or construction of infrastructure, all of which are allowed under Oregon law.

The applicants finally argued that even if the City has the legal authority to impose the condition, that the City should not do so as a matter of public policy because the condition is too draconian and the rights that the applicants must waive are out of proportion to the development that they requested. The Council disagrees. The only right that the applicants waive is their right to potentially delay an LID for six months, after which the City may proceed with the LID regardless of the number of remonstrances filed. Indeed, by unanimous vote, the Council may waive the remonstrances in case of an emergency implicating the health, safety and welfare of the citizens.

The applicant argued that as a practical matter the filing of sufficient remonstrances generally kills the project. While this may be true in some cases, it is equally likely that substantial opposition to the LID would kill the project even if the City held enough non-remonstrance agreements to force it.

The applicants also argued that the fact that the non-remonstrance agreement runs with the land for twenty years, subject to renewal at the City's option for another twenty years, is a significant restriction. In point of fact, all conditions of approval attached to a land use permit run with the land. LOC 49.020. Such conditions are generally perpetual, unless the condition specifically provides otherwise or unless modified pursuant to the Code. LOC 49.035, 49.040, 49.055, 49.060, 49.065, 49.097, 49.100, 49.125.

Statewide Land Use Planning Goal 11 requires the City to plan for and provide key public facilities, including streets, adequate to serve growth during the planning period. This requirement is echoed and implemented by the City Comprehensive Plan Policies cited above and in the staff report, which also require the City to ensure that development provide and/or pay its equitable share for such facilities. The Council concludes that requiring an applicant for a partition to sign a non-remonstrance agreement to allow future improvement of a substandard City street is reasonably related to mitigating the impacts of the partition on that public facility, and is more practical and less onerous on the property owner than requiring immediate construction of a half-street improvement or denying all development which increases density or intensity of use until the street is improved.

The City Council therefore concludes that condition 3 of SD 56-89 is within the authority of the City to impose pursuant to LOC 49.620(1)(B) and (C), is necessary for the partition to comply with LODS 14.020 and the Lake Oswego Comprehensive Plan, and therefore should not be deleted pursuant to this application.

3. Condition 11, the pathway deposit, was imposed pursuant to much the same Comprehensive Plan and Development Standard authority as the requirement for the non-remonstrance agreement. In addition, LOC 49.620(3)(H) and the Pathway Master Plan expressly authorize the City to require dedication and construction of a pathway or deposit of funds sufficient to construct the pathway. For these reasons, and the reasons expressed in the City Attorney's memorandum of October 23, 1992, the Council disagrees with the applicant's arguments that the City lacked legal authority to impose the deposit, that the deposit violates ORS 223.389 or Section 38 of the Charter, or that the deposit is an unlawful "taking" in violation of Article I Section 18 of the Oregon Constitution or the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Council does, however, find the applicants' public policy arguments against the deposit more compelling. In light of the passage of the Bond Issue in September 1990 to pay for construction of pathways pursuant to the Pathways Master Plan, including the pathway along Iron Mountain Boulevard, the Council concludes that appropriate level of Pathway facilities to serve this development will be provided pursuant to the Comprehensive Plan and LODS 14.020 without having to require or maintain the deposit. Under these circumstances, the Council agrees that maintaining and utilizing the deposit when these properties are

now also paying property taxes to fund the same pathway would be bad public policy, if not unlawful.

For these reasons, the Council concludes that Condition 11 should be deleted, and the pathway deposit should be refunded, along with any interest earned by the City on the deposit, to the applicants.

4. The applicants also request payment of their costs expended in seeking this modification and appeal. The applicants cite no authority in the Code or state law which provides for such award. The Council therefore denies the request. Because the applicants prevail in part on this appeal, however, the Council notes that they are entitled to a refund on the transcript deposit pursuant to ORS 227.180(1)(c).

5. The applicants seek no other modification of SD 56-89 and contest no other portion of the DRB's and Staff Decision. The Council therefore adopts and incorporates the remainder of these decisions by reference.

IT IS ORDERED by the City Council of the City of Lake Oswego that the decision of the Development Review Board in AP 93-05-1025 is **AFFIRMED** in part and **MODIFIED** in part, as follows:

1. Condition of Approval 11 of SD 56-89 is hereby deleted; and
2. The cash deposit paid by the applicants pursuant to condition 11 shall be refunded to the applicants, along with the interest earned by the City on the deposit up to the date of refund.

This Order was presented to and adopted by the City Council of the City of Lake Oswego.

DATED this 7th day of October, 1993.

_____

Heather Chrisman, Council President

ATTEST:

_____

Kristi Hitchcock,
City Recorder

AYES: June, Klammer, Puskas, Anderson, Holstein, Chrisman

NOES: None

ABSTAIN: None

EXCUSED: Schlenker

IN THE SUPREME COURT
OF THE STATE OF OREGON

WILLIAM LARSSON	)	
Petitioner/Petitioner	)	ORDER DENYING
DEBRA LARSSON	)	REVIEW
Petitioner/Petitioner	)	
	)	CA A83141
v.	)	SC S41368
	)	
CITY OF LAKE OSWEGO	)	
Respondent/Respondent.	)	

The Court has considered the petition for review and orders that it be denied.

DATE: September 6, 1994.

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

FADELEY, J., NOT PARTICIPATING
DURHAM, J., WOULD ALLOW

COPIES TO:

THOMAS H. NELSON	Attorney for Petitioner/Petitioner
JEFFREY CONDIT	Attorney for Respondent/Respondent

This computer-generated case caption may not comply with ORAP 2.05(1) & 5.05(3).

49.16.050. Violations; abatement; injunction.

1. Any person who fails to comply with, or who violates, any provision of this chapter, or who fails to carry out the terms and conditions of any development approval, shall have committed a civil infraction subject to a forfeiture of not less than $50.00 or more than $500.00 per violation and enforceable pursuant to LOC 34.04.101 to 34.04.145. Each day that the violation exists shall constitute a separate violation.

2. Any development which occurs contrary to the provisions of this chapter or contrary to any permit or approval issued or granted hereunder is hereby declared to be unlawful and a public nuisance, and may be abated pursuant to LOC 34.08.400 to 34.08.490.

3. Upon request of the Planning Director, the City Attorney may institute an appropriate action in any court to enjoin the maintenance of any use, occupation, building or structure which is in violation of any provision of this chapter.

4. The rights, remedies and penalties provided in this chapter are cumulative, are not mutually exclusive, and are in addition to any other rights, remedies and penalties available to the City under any other provisions of law. (Ord. No. 2088, Enacted, 03/03/94)

RESTRICTIVE COVENANT
WAIVING RIGHT OF REMONSTRANCE
FOR STREET IMPROVEMENTS

JUN 26 1990

The undersigned, being the legal owners of the real property described below, do hereby consent to the improvement of the public streets bordering said property. In consideration of not being required to improve the said streets at this time, we hereby expressly waive any and all right to remonstrate against the improvement of said streets in accordance with the City of Lake Oswego's applicable street improvement standards in effect at the time of such improvement. We irrevocably consent to the formation of a Local Improvement District by the City of Lake Oswego or the inclusion of said property into a zone of benefit, for the purpose of assessing the cost of such improvement to the said property and to any other property benefited by the improvement, such assessment to be made in accordance with applicable laws and ordinances as the same may exist at the time of the improvement. It is understood that "improvement of streets", as the term is used herein also applies to alleys, and includes construction of curbs and gutters, sidewalks, storm drains, illumination, traffic control devices, and all other work and improvements deemed necessary by the City of Lake Oswego to bring the streets into conformance with applicable improvement standards.

Also, in the event that the property described below is approved or becomes approved for subdivision, the undersigned waives any and all right to remonstrate against a method of assessment which distributes the assessment equally among the subdivided parcels.

The signatures appearing on this document are to be construed as equivalent to signatures appearing on a petition to form a Local Improvement District for the aforesaid purposes.

The covenants herein contained shall be binding upon the undersigned and upon all subsequent owners of said property as covenants running with the land and effective for twenty years from the date hereof; provided, however that the City of Lake Oswego shall have the right to extend the covenants for an additional twenty years by recording a notice of such extension in the deed records of the County in which said property is situated prior to the expiration of the first twenty year period.

The property subjected to these covenants is:

See attached Exhibit A

The following information is for reference purposes only:

Tax Map 21E 3CC	Tax Lot(s)	Site address
		1210 & 1250 Chandler

City of Lake Oswego Public Works and Land Development Service file # SD 56-89.

SIGNATURE(S), OWNER(S) OF RECORD

s/Debra T. Larsson	Debra T. Larsson	6-15-90
Signature	Print Name	Date
s/Robert L. Nelson	Robert L. Nelson	6-26-90
Signature	Print Name	Date

STATE OF OREGON)
) ss.
COUNTY OF Clackamas)

BE IT REMEMBERED THAT on this 15 day of June, 1990, before me, the undersigned, a Notary Public in and for the said County and State, personally appeared the within named Debra T. Larsson who are known to me to be the identical individuals described in and who executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET BY HAND AND SEAL THIS 15 of June, 1990.

s/ Kathryn Miller
Notary Public for Oregon
Commission Expires: 3-19-92

STATE OF OREGON)
) ss.
COUNTY OF Clackamas)

BE IT REMEMBERED THAT on this 25 day of June, 1990, before me, the undersigned, a Notary Public in and for the said County and State, personally appeared the within named Robert L. Nelson who are known to me to be the identical individuals described in and who executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET BY HAND AND SEAL THIS 25 of June, 1990.

s/ Kathryn Miller
Notary Public for Oregon
Commission Expires: 3-19-92

EXHIBIT A - RESTRICTIVE COVENANT

A TRACT OF LAND SITUATED IN THE SW 1/4 OF SECTION 3, T2S, R1E, WM, CLACKAMAS COUNTY, OREGON, BEING LOTS 71-73 AND PT. LOT 74, "FOREST HILLS", BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE SOUTHERLY RIGHT OF WAY LINE OF CHANDLER ROAD THAT IS N 70°48'26" E 13.81 FEET FROM A 1/2" IRON PIPE AT THE NORTHWEST CORNER OF LOT 74, "FOREST HILLS"; THENCE N 70°48'26" E ALONG SAID SOUTHERLY RIGHT OF WAY LINE OF CHANDLER ROAD, 83.28 FEET TO A 1/2" IRON PIPE; THENCE CONTINUING ALONG SAID SOUTHERLY RIGHT OF WAY LINE ON A CURVE TO THE RIGHT HAVING A RADIUS OF 249.43 FEET THROUGH A CENTRAL ANGLE OF 38°42'04" (LONG CHORD BEARS S 89°50'32" E 165.30 FEET) AN ARC LENGTH OF 168.48 FEET TO A POINT; THENCE S 70°29'00" E 101.66 FEET TO A 1/2" IRON PIPE; THENCE SOUTHEASTERLY ON A CURVE TO THE RIGHT HAVING A RADIUS OF 117.68 FEET THROUGH A CENTRAL ANGLE OF 70°30'35" (LONG CHORD BEARS S 35°13'43" E 135.85 FEET) AN ARC LENGTH OF 144.82 FEET TO A POINT OF COMPOUND CURVE IN THE WESTERLY RIGHT OF WAY LINE OF IRON MOUNTAIN BOULEVARD; THENCE ALONG THE WESTERLY RIGHT OF WAY LINE OF IRON MOUNTAIN BOULEVARD ON A CURVE TO THE RIGHT HAVING A RADIUS OF 250.00 FEET THROUGH A CENTRAL ANGLE OF 56°09'32" (LONG CHORD BEARS S 27°56'51" W 235.35 FEET) AN ARC LENGTH OF 245.04 FEET TO THE SOUTHWEST CORNER OF LOT 71, "FOREST HILLS"; THENCE LEAVING THE NORTHWESTERLY RIGHT OF WAY LINE

OF IRON MOUNTAIN BOULEVARD, N 44°55'21" W (PLAT N 45°00'00" W) ALONG THE NORTHEASTERLY LINE OF LOT 70, "FOREST HILLS" 257.24 FEET (PLAT 256.99 FEET) TO A 1/2" IRON PIPE AT THE NORTHEAST CORNER OF SAID LOT 70; THENCE N 41°16'24" E 191.29 FEET TO THE PLACE OF BEGINNING.

Order No. 855229 C
Legal Description

EXHIBIT "A"

A tract of land situated in the Southwest one-quarter of Section 3, Township 2 South, Range 1 East of the Willamette Meridian, in the County of Clackamas and State of Oregon, being a part of Lots 73 and 74, according to the duly filed plan of "FOREST HILLS", being more particularly described as follows:

Beginning at a 1/2 inch iron pipe at the Northeast corner of Lot 70, "FOREST HILLS", which 1/2 inch iron pipe is in the Southwest line of Lot 74, "FOREST HILLS"; thence leaving said Southwest line of Lot 74, North 41°16'24" West 25.00 feet to a 5/8 inch iron rod and the true place of beginning; thence North 65°11'20" East 84.52 feet to a 5/8 inch iron rod; thence North 00°56'57" West 129.66 feet to a 5/8 inch iron rod in the Southerly right of way line of Chandler Road; thence Westerly along said Southerly right of way line on a curve to the left having a radius of 249.43 feet through a central angle of 24°37'27" (long chord bears South 83°07'10" West 106.38 feet) an arc distance of 107.20 feet to a 1/2 inch iron pipe, thence South 70°48'26" West 83.28 feet to a 5/8 inch iron rod, said 5/8 inch iron rod bears North 70°48'26" East 13.81 feet from a 1/2 inch pipe at the Northwest corner of said Lot 74; thence leaving said Southerly right of way line of Chandler Road, South 41°16'24" East 166.29 feet to the true place of beginning.

STOEL RIVES BOLEY
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STANDARD INSURANCE CENTER
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PORTLAND, OREGON-1268

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Cable Lawport
Telex 703455
Writer's Direct Dial Number
(503) 294-9281

September 3, 1992

Michael R. Wheeler
Associate Planner
Department of Planning and Development
CITY OF LAKE OSWEGO
380 A Avenue
P.O. Box 369
Lake Oswego,OR 97034

Re: William and Debra Larsson

Dear Mr. Wheeler:

In response to your letter of August 13, 1992, I am enclosing an original and seven copies of a completed application for minor changes in the Larsson's development permit in File No. 56-89. The $400 filing fee was tendered by letter dated July 24, 1992.

Please let me know what further steps are necessary to move this application forward.

Thank you for your attention, and we look forward to working with you on this matter.

Very truly yours,

s/Thomas H. Nelson

Thomas H. Nelson

Enclosure: Application
cc: William & Debra Larsson

ADMINISTRATIVE REVIEW
for
MINOR CHANGES TO DEVELOPMENT PERMITS

OWNER
Name William and Debra Larsson
Address 1210 Chandler Road
City Lake Oswego State OR Zip 97034
Signature _____
Phone 636-2887

* APPLICANT
Name Thomas H. Nelson
Company STOEL RIVES BOLEY
Address 900 S.W. Fifth Avenue
City Portland State OR Zip 97024
Phone 294-9281

DESCRIPTION OF PROPERTY (TOTAL PROPERTY)
TAX MAP 2 1E 3CC TAX LOTS(S) 3400
LOT SIZE Orig: 86,058 sq. ft.
(Acres/Sq. Ft.)
OR
LEGAL DESCRIPTION, METES AND BOUNDS (ATTACH COPY) PLAT NAME _____ LOT _____ BLOCK _____

USE
EXISTING Residential PROPOSED Same

PROPERTY OWNERSHIP LIST
If necessary, attach a list of the names and addressed of the owners and renters of properties located within 200 feet of

*If the applicant is not the property owner, he must attach documentary evidence of his authority to act as agent in making application.

the subject property. Lists of property owners may be obtained from any title insurance company or from the County Assessor. If the property ownership list is incomplete, this may be cause for postponing the hearing or administrative decision.

USE

EXISTING Residential PROPOSED Same

EXISTING STRUCTURE(S) House, Guest House, and Green House (shown on Ex. 1)

PROJECT DESCRIPTION

Recover bikepath exaction and remove nonremonstrance agreement from chain of title through determination that conditions imposing same were illegal. Zoning: R-10

ZONING

COMPREHENSIVE PLAN DESIGNATION

NEIGHBORHOOD ASSOCIATION None

PREVIOUS ACTION Application to create two parcels approved 4/16/90.

DO NOT WRITE BELOW THIS LINE

FILE NO. _____	PRE-AP MEETING _____
RECEIPT NO. _____	DRB OR PC HEARING _____
RECEIVED BY _____	ADMINISTRATIVE DECISION ____
DATE RECEIVED ____	FINAL ACTION TAKEN _____
COMPLETENESS CHECK DATE_____	PROJECT COORDINATOR _____

I consent to an on-site inspection by an employee of the City of Lake Oswego. Attorney for

Date Sept. 2, 1992 Property Owner's Signature s/Thomas H. Nelson

Date _____ Property Owner's Signature_____

Revised 5/8/91

NARRATIVE STATEMENT ACCOMPANYING APPLICATION FOR MINOR CHANGES TO DEVELOPMENT PERMIT

Introduction

By a pleading dated May 1, 1992, William and Debra Larsson moved to reopen a prior land use decision in File No. 56-89. A copy of that motion is attached hereto as Exhibit 1. In response, by letter dated May 27, 1992, Michael R. Wheeler, Associate Planner, informed the Larssons that the appropriate procedure to reopen the referenced decision and to address the merits of the issue would be by application for minor changes to development permits. A copy of Mr. Wheeler's letter is attached hereto as Appendix 2. Mr. Wheeler also informed the Larssons that the filing fee for such an application was $400. On July 24, 1992 the Larssons, through their attorney, submitted a document titled "Application for Minor Changes to Development Permit," together with the $400 filing fee. On August 13, 1992, Mr. Wheeler wrote to Mr. Nelson stating that the City required

> "a completed application form, site plan, supporting graphics, and narrative. The narrative must include a description of how the proposed modification complies with LOC 49.124 (1-4), applicable provisions of the Development Code, Development Standards, and other development-related ordinances. The Application must be signed by the property owner or written evidence of your authority to act as agent must be provided."

This revised application and narrative summary accompanies the one-sheet "Application for Administrative Review for Minor Changes to Development Permits." Written authorization for

Mr. Nelson to represent the Larsson in this matter is attached to the one-sheet application form submitted herewith.

A site plan and supporting graphics are attached hereto as Exhibit 1.

Narrative

First, addressing LOC 49.125 (1-4), the Larssons contend:

(1) The change requested herein will not increase the intensity of any use, or the density of residential use, of land, and

(2) The change requested herein meets all requirements of all legal development standards and other requirements legally imposed; in fact, the reason that this application is submitted is to determine the legality of two existing requirements that Applicants believe to be illegal; and

(3) The change requested herein will not significantly affect other property or uses, will not cause any deterioration or loss of any natural feature, process or open space, and will not significantly affect any public facility; and

(4) The change requested herein does not affect any condition specifically placed on the development by action of a hearing body or City Council. (The prior action was administrative in nature.)

The application does not seek to change any existing use of land. Rather, it seeks a determination of the legality of two conditions it attached to its approval of their application to create

two parcels from one parcel of lane, viz., (1) the legality of the exaction of over $5000 to fund a bikepath along Iron Mountain Boulevard (condition 11), and (2) the legality of a "non-remonstrance agreement" (condition 3). Applicants contend that both of these conditions are illegal.

(1) The Bikepath Exaction. Applicants contend that the bikepath exaction was illegal and unconstitutional. Specifically, the exaction appears to be a violation of ORS 223.389 (imposition of special assessments by resolution or ordinance), Section 38 of the Lake Oswego City Code (imposition of special assessments by ordinance), Article I, Section 18 of the Oregon Constitution (taking of property without just compensation), and the fifth and fourteenth amendments to the Constitution of the United States (taking of property without due process of law). The Larssons seek a refund of all bikepath funds paid to the City, plus statutory interest.

(2) The Nonremonstrance Agreement. Applicants contend that the nonremonstrance agreement was illegally obtained and is both illegal and unconstitutional. In essence, the non-remonstrance agreement requires that Applicants forfeit civil and political rights in return for development authorizations. It is a longstanding principle of law that governmental benefits may not be conditioned upon the surrender of constitutional rights. More specifically, the agreement deprived Applicants' right to, and chilled their exercise of, free speech and the right to petition the government for redress of grievances under Oregon Constitution Article I, Section 8 and Article I, Section 26 and under the first and fourteenth amendments to the United States Constitution; it deprived them of their right to free elections as specified in Article II, Section 1 of the Oregon Constitution and under 42 USC § 1973(a); it is preempted by 5 USC § 1502(a)(1) (the Hatch Act),

and it is in violation of the Oregon Corrupt Practices Act, ORS 260.665.

Applicants intend to provide full legal analyses backing these claims once this application is processed and this proceeding moves forward.

Applicants William and Debra Larsson look forward to working with the City on this matter.

DATED: September 3, 1992.

Respectfully submitted,

Thomas H. Nelson
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Ste. 2700
Portland, OR 97204
Telephone: (503) 294-9281

Of Attorneys for Applicants

IN THE SUPREME COURT OF THE STATE OF OREGON

WILLIAM AND DEBRA LARSSON,	)	Supreme Court No. S41368
	)	LUBA No. 93-174
	)	Court of
Petitioner-Appellants,	)	Appeals No. A83141
	)	
v.	)	PETITIONER-APPELLANTS' MEMORANDUM OF ADDITIONAL AUTHORITIES
	)	
CITY OF LAKE OSWEGO,	)	
	)	
Respondent-Appellee.	)	

Petitioners William and Debra Larsson respectfully wish to call the Court's attention to the recent decision by the Supreme Court of the United States, Florence Dolan v. City of Tigard, ___ US ___, ___ S Ct ___, ___ L Ed 2d ___, 94 US LEXIS 4826 (June 24, 1994). That case stands for the proposition that, in order to avoid an unconstitutional taking, there must be a proportional relationship between the burden inflicted by development and the property rights demanded as a condition of development. A copy of that opinion is attached as Exhibit 1. That decision reversed the prior opinion of this Court, Dolan v. City of Tigard, 317 Or 110, 854 P2d 437 (1993), and remanded the matter for further proceedings; as a result, a detailed discussion of the facts and issues involved in Dolan does not seem warranted.

One aspect of the U.S. Supreme Court's decision does, however, bear emphasis. In their Petition for Review, Petitioners claimed that the City of Lake Oswego's requirement that a

nonremonstrance agreement be provided as partial consideration for a development permit is an unconstitutional condition. Interestingly, the U.S. Supreme Court's decision addresses the doctrine of unconstitutional conditions:

> "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. See *Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Ed. of Township High School Dist. 381 U.S. 563, 568 (1968).*"

Exhibit 1 at page 5. Because there is no demonstrated nexus between Petitioners' development and the nonremonstrance

agreement, Petitioners assert the nonremonstrance agreement must be invalidated on the basis of Dolan.

DATED: June 28, 1994.

Thomas H. Nelson, OSB No. 78315
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
Telephone: (503) 294-9281
Attorney for Petitioner-Appellants
William and Debra Larsson

Supreme Court, U.S.
FILED
JAN 4 1995
OFFICE OF THE CLERK

No. 94-1009

In The

Supreme Court of the United States

October Term, 1994

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO, OREGON,

Respondent.

On Petition For Writ Of Certiorari
To The Oregon Supreme Court

BRIEF IN OPPOSITION TO PETITION

JEFFREY G. CONDIT,
City Attorney
Counsel of Record

City of Lake Oswego
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Lake Oswego, Oregon 97034
(503) 635-0225

Attorney for Respondent
City of Lake Oswego

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question as stated by Petitioners assumes the answer the Petitioners seek. The actual question presented by the Petition should be restated as follows:

Does a municipality violate the rights of an applicant for a land use permit under the First Amendment to the United States Constitution or the Voting Rights Act by imposing a condition upon a land use permit under the following circumstances:

1. The municipality makes an uncontested determination pursuant to a public hearing process that the condition is required in order to comply with a criterion for approval of the land use permit;

2. The condition requires the applicant to execute a written waiver of his or her ability under the local improvement ordinance to participate in a procedure that can delay formation of a local road improvement district for six months (a "non-remonstrance agreement"); and

3. The local improvement ordinance requires two public hearings, the first prior to formation of the local improvement district and the second prior to levying a special assessment to pay for the local improvement, at which anyone, including persons who have signed non-remonstrance agreements, may appear before the governing body and testify in favor or in opposition to formation of the local improvement district?

LIST OF PARTIES

The caption contains the names of all parties to this proceeding.

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No. 94-1009

In The

Supreme Court of the United States

October Term, 1994

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO, OREGON,

Respondent.

On Petition For Writ Of Certiorari
To The Oregon Supreme Court

BRIEF IN OPPOSITION TO PETITION

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Petition and Appendix omit several ordinances and regulations involved in this case in violation of Rule 14.1(f) of this Court. The City has incorporated such Ordinances and Regulations in its Appendix.

1. Lake Oswego Charter, Chapter IX. Public Improvement, Section 37, Improvements.

2. Lake Oswego Code, Chapter 40, Improvement Procedure, Sections 40.010 to 40.160.

   Note: Provisions of the Lake Oswego Code were reformatted and renumbered from a five digit to a seven digit format on March

31, 1994. This update did not substantively change the provisions. The Appendix and the brief reference the five digit format for consistency and clarity.

3. Oregon Revised Statutes (ORS) 223.387 to 223.401

I.

STATEMENT OF THE CASE

Respondent City of Lake Oswego ("City") respectfully requests this Court to deny the Petition for a Writ of Certiorari to the Oregon Supreme Court to review the opinion in *Larsson v. City of Lake Oswego*, 127 Or. App. 647, 874 P.2d 99 (1994).

A. The Facts:

In 1989, Petitioners applied to partition their 86,058 square foot property, located at the intersection of Iron Mountain Boulevard and Chandler Road in the City of Lake Oswego, into two parcels 20,078 and 65,980 square feet in size. App. 43a - 44a. The original minor partition (City file number SD 56-89) was approved by City staff on April 16, 1990, as a "minor development" pursuant to Lake Oswego Code (LOC) 49.140(1)(H). *Id.* Minor developments are staff decisions, subject to notice and the opportunity to appeal. LOC 49.200 to 49.225. *Id.*

Staff imposed a number of conditions of approval on the partition pursuant to LOC 49.620, which allows the City to impose conditions or restrictions on any major or minor development approvals in order to protect the public, implement the requirements of the Comprehensive Plan and Chapter 49, and/or to fulfill a need for

public services created or increased by the proposal. *Id.* LOC 49.620(1)(A),(B) and (C). These conditions included condition 3, which required the applicants to sign a non-remonstrance agreement and petition for formation of a local improvement district (LID) for future street improvements along Iron Mountain Boulevard and Chandler Road. *Id.*

The Petitioners did not appeal SD 89-56, and subsequently executed the non-remonstrance agreement. *Id.* The partition was completed, the new parcel (parcel 2) was sold, and a new dwelling was constructed on the new parcel during the summer of 1990. *Id.* The Petitioners retained parcel 1, which is occupied by their preexisting residence. *Id.*

In 1993, the Petitioners filed an application to modify the approved partition by deleting conditions 3 and 11 as applied to Parcel 1. *Id.* The application was filed pursuant to LOC 49.125, which requires such modifications to be processed as minor developments. *Id.* Staff denied the request on January 15, 1993. The applicants appealed the decision to the City's Development Review Board (DRB) pursuant to LOC 49.225, which held a de novo hearing and denied the modification on April 19, 1993. *Id.* Applicants then appealed the DRB's decision to the City Council. *Id.*

On October 7, 1993, the Council adopted its Findings and Order deleting condition 11, but retaining condition 3. App. 40a. The Petitioners appealed the Council's decision to retain condition 3 to the State of Oregon Land Use Board of Appeals (LUBA). On February 8, 1994, LUBA issued its opinion affirming the City Council's decision.

Larsson v. City of Lake Oswego, 26 Or. LUBA 515 (1994); App. 13a. The Petitioners appealed LUBA's decision to the Oregon Court of Appeals, which affirmed LUBA's decision. 127 Or. App. 647, 874 P.2d 99 (1994); App. 1a. The Petitioners then filed a Petition for Review with the Oregon Supreme Court, which denied the Petition. 320 Or. 110, 881 P.2d 141 (1994); App. 54a.

II.

ARGUMENT

REASONS FOR DENYING THE WRIT

This case does not present the First Amendment issues that Petitioners ask the Supreme Court to decide. The condition imposed by the City on Petitioners' land use permit does not require the petitioners or their successors in interest to surrender any right to speak in opposition to formation of a local improvement district. The City's Improvement Procedures Ordinance (LOC Chapter 40) requires the City Council to hold a public hearing prior to formation of a local improvement district at which any person, including Petitioners, can testify in opposition, in favor, or in any other manner they desire. As the Oregon Court of Appeals succinctly held:

> [T]he remonstrance procedure, and the so-called non-remonstrance condition, affect only petitioner's right to be counted in an extraordinary majority that can abate the decision for six months; they do not limit petitioners' right to speak on the proposed district or any related matters orally or in writing. 127 Or. App. at 651; App. 8a.

As the Court of Appeals decision makes clear, this is a statutory interpretation case, not a First Amendment case.

For this reason, the case also does not implicate the doctrine of "unconstitutional conditions," which is only applicable if a condition affects a constitutional right. The Petitioners do not and have not alleged that the condition violates the Fifth Amendment to the United States Constitution. This Court's holding in *Dolan v. City of Tigard*, 114 S. Ct. 2308 (1994) (*"Dolan"*) is thus not applicable.

In conclusion, this case does not present an important question of federal law worthy of the Supreme Court's review under Rule 10(1) of this Court.

A. The Permit Condition Imposed By The City Does Not Affect Speech.

Petitioners' argument in its first reason for granting the writ is based upon a fundamental misstatement of the case. As Petitioners correctly note in their Statement of the Case (Petition, Page 5-6), the issue before this Court and the lower tribunals is whether the City appropriately imposed a condition on approval of a land use permit that requires the Petitioners to execute an agreement waiving their right to remonstrate against formation of a local improvement district. Petitioners' argument is based not on the City's decision to impose the condition, but on selected excerpts from the non-remonstrance agreement that Petitioners subsequently executed as a result of the condition. As LUBA notes, the validity of the agreement itself is not presented in this case. 26 Or. LUBA at 518; App. 15a-16a.

Perhaps as a result of this fundamental error, petitioners base their entire argument that the City infringes on their freedom of speech upon the definition of "remonstrate" in *Webster's Seventh New Collegiate Dictionary* 725 (1971). Petition, pages 8-9. This argument ignores the Council's express interpretation of the term and the context of the term in both the agreement and in the City Code.

Lake Oswego City Charter Chapter IX, Section 37 authorizes the City to provide by ordinance for construction of local improvements by special assessment of benefitted properties via formation of a local improvement district (LID). Respondent's Appendix (R.App.) 1a. Pursuant to this authority, Lake Oswego Code (LOC) 40.010 to 40.160 (the Improvement Procedures Ordinance) sets forth the process for initiation and creation of an LID.[1] R.App. 2a-20a.

The Ordinance requires the City Council to hold two public hearings, the first prior to formation of the LID and the second upon completion of the project prior to

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[1] In the State of Oregon, the requirements and procedures for constructing a local improvement by assessment of benefitted properties via formation of a local improvement district is entirely a creature of local charter and ordinance. Although Oregon Revised Statutes (ORS) 223.387 to 223.401 provide general authority to construct local improvements by special assessment, ORS 223.389 expressly empowers a local government to enact its own procedures for formation and assessment of an LID. R.App. 20a-26a, 22a. ORS 223.389(2) does not require cities to accord remonstrances of property owners any special weight. R.App. 22a. A city may provide for remonstrance against all, some or no types of local improvement districts. *City of Woodburn v. Dekabi*, 20 Or. App. 426, 531 P.2d 913 (1975).

imposition of the assessment. LOC 40.060; 40.090; R.App. 8a-9a; 12a-13a. Prior to the first hearing, a property owner in the proposed district may file a written remonstrance to formation of the LID. LOC 40.050(1); R.App. 7a. If two-thirds of the owners file such written remonstrances, formation of the LID is suspended for six months. *Id.* LOC 40.050(2) expressly provides, however, that oral objections will also be considered at the public hearing. R.App. 8a. In addition, LOC 40.060(2) expressly requires the City Council to consider *any* testimony in addition to the written remonstrances prior to making the decision to form the LID. R.App. 8a. Notice of these respective rights are published twice in the newspaper and mailed to all property owners in the proposed district prior to the hearing on formation.[2] LOC 40.040(1)(e),(f); (2)(a),(e). R.App. 5a-7a.

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[2] Petitioners argue in subsections B and C of their first argument that the non-remonstrance condition is vague and overbroad, and thus could chill protected speech, because a subsequent property owner could read the non-remonstrance agreement out of context and presume that he or she could not testify at all. Petition, pages 12 to 16. As noted above, the notice provisions of LOC 40.040 require written notice to be sent ten days prior to the hearing to all property owners in the proposed LID. LOC 40.040(2). R.App. 7a. The required notice specifically differentiates between written remonstrances and oral testimony. LOC 40.040(2)(a),(e); 40.040(1)(e),(f). R.App. 5a-7a. All persons subject to a non-remonstrance agreement are thus fully informed of the distinction, and of their rights to testify, prior to the hearing on formation of the LID.

Indeed, Petitioners' vagueness and overbreadth arguments are contradictory. Petitioners' overbreadth argument presumes that a property owner subject to a non-remonstrance agreement will be ignorant of his or her rights under the City's Improvement Procedures Ordinance and will not expend any effort to

Condition 3 of the original minor partition required the Petitioners to execute a non-remonstrance agreement waiving their right to file a written remonstrance to formation of an LID for road improvements. App. 43a-44a. The condition was imposed to comply with an approval criterion that requires a minor development to provide public services, including roads, up to city standards. App. 44a-45a. City staff testified that the abutting roads were not up to City Standards in terms of width, curbs, gutters, storm drainage, sidewalks or pathways. App. 45a. The Council concluded that the condition would allow improvement of the substandard city streets when the increased traffic resulting from the additional density, in conjunction with traffic produced as a result of other incremental development, creates the need to improve the road. App. 46a-47a. The Council concluded that this condition is reasonably related to mitigating the traffic impacts resulting from the partition and was more practical and less burdensome on the property owner than requiring immediate construction of a half-street improvement or denying all development that would increase density or intensity of use until the street is improved.[3] *Id.*

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discover those rights. Petition, pages 14 -15. Petitioners' vagueness argument, on the other hand, presumes that a property owner has knowledge of the enforcement provisions of the City's development ordinance and would be "chilled" by such knowledge from testifying. Petition, pages 12 and 13. Because of the notice requirements of LOC 40.040, the exact opposite will be true.

[3] Petitioners have not and do not contest the City's rationale or evidentiary support for imposition of the condition pursuant the applicable City Code Provisions.

In response to the Petitioners' argument that the partition permit should be modified to delete condition 3, the City Council construed the ordinance scheme as follows:

> *Applicants' primary argument is that the agreement deprives them, or chills their exercise of, free speech and the right to petition government for redress of grievances under Oregon Constitution Article I, Section 8 and Article I, Section 26, and under the First and Fourteenth Amendments of the U.S. Constitution, because it prevents them from objecting to the formation of an LID.*
>
> *The Council disagrees. Lake Oswego Charter Article IX, Section 37 and LOC Chapter 40 govern formation of LIDs. LOC 40.060 and 40.090 require two public hearings to be held: The first hearing is to determine whether the proposed LID should be formed, draw the appropriate boundaries of the LID, determine the appropriate assessment formula and set the appropriate interest rate. The second hearing is to hear objections to the amount of the assessment. LOC 40.050(1) authorizes affected property owners to file written remonstrances objecting to formation of the LID at the time of the first hearing. If written remonstrances are received from at least two-thirds of the property owners, formation of the LID is suspended for six months. A non-remonstrance agreement waives the property owner's right to file a written remonstrance and thereby potentially delay the project for six months.*
>
> *LOC 40.050(2), however, expressly authorizes and requires the Council to consider oral objections to the project at the first hearing. LOC 40.040 expressly requires the published notice to state that*

> *oral objections will be considered at the public hearing. LOC 40.060(2) expressly requires the Council to consider any testimony in addition to written remonstrances in deciding whether to proceed with formation of the LID. LOC 40.080(2) and 40.090 notifies and allows "all persons" to testify in objection to the proposed assessments at the second hearing. Regardless of whether a person has waived his or her right to delay the project in a non-remonstrance agreement, such persons are notified of their right to appear, and may appear, before the Council at the first and second public hearings and object to or otherwise testify regarding the LID on the merits. Based upon this express language, the Council concludes that the non-remonstrance agreement condition does not limit the applicants' right to speak on any issue or to seek redress of grievances from the Council in violation of the constitutional provisions cited above.* App. 47a-48a.

Both LUBA and the Court of Appeals cited the Council's above noted finding with approval. *Larsson*, 26 Or. LUBA at 520, App. 18a-19a; 127 Or. App. at 650, App. 6a-7a. Indeed, both LUBA and the Court of Appeals concluded that they would have independently arrived at the same conclusion based upon the clear language of the City Code. 26 Or. LUBA at 522-523, App. 21a-22a; 127 Or. App. at 651, App. 7a-8a.

For these reasons, the City submits that this is really a simple statutory construction case. Petitioners' claim that the contested condition restricts "the only legal way a citizen can effectively oppose formation of an LID" is

facially refuted by LOC 40.050(2), 40.060(2) and 40.090.[4] Unless this Court concludes that these provisions do not mean what they say, this case is not a First Amendment case.

Petitioners also argue that the non-remonstrance condition affects their voting rights under the Voting Rights Act, 42 U.S.C.A Section 1973i(a) (1994) and the general civil rights statute, 42 U.S.C.A. Section 1983 (1994). Once again, Petitioners bootstrap an argument from general definitions and ignore the applicable language of the City Code. The cited definitions broadly describe "vote" as an official expression of choice by an "elector" or "voter" on a "proposed measure." LOC 40.050(1) does not call for an election by the voters on formation of an LID. Rather, it grants affected property owners a special right not enjoyed by city electors generally to participate in a procedure that can, in certain circumstances, delay formation of an LID for six months. This case is not a voting rights case, either.

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[4] The right to testify on formation of the LID granted by these provisions also refutes Petitioners' argument that the condition inhibits the right to petition government for redress of grievances. Petitioners argue, however, that the right to petition means more than the opportunity to express their opinion, it also must include the right to be heard in a "meaningful way." Petition, page 17. Petitioners apparently believe the "right to petition" includes the right to compel the government to grant the petition. The republican form of government would quickly become impossible if this were the standard. The constitutional cure for non-responsive government officials is the ballot box.

B. Because The Permit Condition Does Not Affect First Amendment Rights, It Also Does Not Implicate The "Doctrine Of Unconstitutional Conditions."

Petitioners argue that the City's condition requiring them to sign a non-remonstrance agreement impermissibly conditions receipt of a government benefit on the waiver of constitutionally guaranteed free speech rights in violation of the "doctrine of unconstitutional conditions." Petitioners note that this Court cited the doctrine in support of its decision in *Dolan v. City of Tigard*, 114 S. Ct. at 2316 - 2317, and argue that such reference requires "at a minimum" that the Petition be granted and the case sent back to the Oregon Supreme Court to address the doctrine.

By definition, however, the doctrine is only implicated if the condition attached infringes on a constitutionally protected interest. *Dolan, supra; Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). As noted above, the City Council, LUBA and the Oregon Court of Appeals concluded at the threshold that the non-remonstrance agreement condition does not infringe on Petitioners' rights of speech or expression under the First Amendment, based upon the clear language of the City's Improvement Procedures ordinance. Unless this Court reverses the interpretation of this ordinance by the three Oregon tribunals, there is no "unconstitutional" condition for the Oregon Supreme Court to address. Petitioners do not raise and have not raised a *Dolan*-style Fifth Amendment claim, or any other constitutional defect aside from their First Amendment arguments.

In addition, this Court noted in *Dolan* that the doctrine of unconstitutional conditions only prohibits such a condition if it has "little or no relationship" to the discretionary benefit conferred by the government. 114 S. Ct. at 2316 - 2317. In this case, the City Council expressly concluded, based upon the evidence in the record, that the condition was reasonably related to mitigating the impact of the increased traffic that would result from the partition, in conjunction with other incremental development on the street. App. 46a-47a. The Council also concluded that the waiver, which requires no up-front expense and may not be triggered for years, was more practical and less burdensome on the property owner than the City's other available options for ensuring adequate streets. *Id.* The Council thus made "an individualized determination" that the condition "is related both in nature and extent to the impact of the proposed development," the test articulated by this Court in *Dolan*. 114 S. Ct. at 2319 to 2320. The Petitioners did not challenge these findings and conclusion.

For these reasons, this case is also not an unconstitutional conditions case.

C. This Case Does Not Warrant Review By The United States Supreme Court.

Rules of the Supreme Court Rule 10.1 sets forth this Court's guidelines for deciding whether to grant a Petition for Certiorari. Rule 10.1(b) and 10.1(c) regard petitions for review of state court decisions.

Rule 10.1(b) favors review of cases where a state court decides a federal question in conflict with another

state court of last resort or a decision of a United States Court of Appeals. Petitioners have identified no conflicting cases on point. Indeed, the Washington State Supreme Court and Court of Appeals have both concluded that similar non-remonstrance agreements to annexation do not violate the First Amendment. *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima*, 122 Wash. 2d 371, 858 P.2d 245 (1993); *Five Mile Prairie v. City of Spokane*, 51 Wash. App. 816, 755 P.2d 836 (1988). The only reported federal case on point also concludes that similar non-remonstrance agreements to annexation do not violate the First Amendment. *Blackwell v. City of St. Charles*, 726 F. Supp. 256 (E.D. Mo. 1989), *aff'd based on the district court's reasoning*, 917 F.2d 1150 (8th Cir. 1990). Review of this case is not warranted under Rule 10.1(b).

Rule 10.1(c) favors review when a state court has decided an important question of federal law which has not been, but should be settled by the U.S. Supreme Court, or which conflicts with a decision of the Supreme Court. As noted above, this case is really a statutory interpretation case, not a First Amendment case. Petitioners only get to the First Amendment by ignoring their rights to testify on formation of an LID granted by the City Code. The Petitioners' interpretation was unanimously rejected by the City Council, LUBA and the Oregon Court of Appeals. The Oregon Supreme Court did not find a significant enough *state* question to take the case. This is not a case worthy of the attention of the United States Supreme Court.

III.

CONCLUSION

For these reasons, Respondent City of Lake Oswego, Oregon, respectfully requests the Court to deny the Petition for Writ of Certiorari to the Oregon Supreme Court.

Dated: January 4, 1995.

Respectfully submitted,

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APPENDIX TO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

Lake Oswego Charter
Chapter IX. Public Improvement,
Section 37, Improvements

Section 37. Improvements.

The procedure for making, altering, vacating, or abandoning a public improvement or other service is governed by general ordinance or, to the extent not so governed by the applicable general laws of the state. The formation of an assessment district, or local improvement district or similar area to be assessed for the financing of any public improvements proposed to be financed wholly or in part by assessment specifically against benefited properties shall be suspended for six months upon a remonstrance thereto by the owners of two-thirds of the property proposed to be assessed therefor. The Council may proceed notwithstanding such two-thirds remonstrance: (a) if the improvements is a sidewalk, or (b) if the Council by unanimous vote of the members present and eligible to vote declares that the improvement is needed at once because of emergency. For the purpose of this Section "owner" means the record holder of legal title; except that, if there is a purchaser of land according to a record land sale contract, or according to a verified writing by the record holder of legal title to the land filed with the City Recorder, the purchaser is the "owner." For the purpose of this Section, an emergency is an immediate hazard to the health, safety, or welfare of the people of Lake Oswego, proved by reliable, substantial and probative evidence on the record before the City Council.

Lake Oswego Code
Chapter 40, Improvement Procedure
Sections 40.010 to 40.160

40.010. Definitions.

Unless the context requires otherwise:

(1) "Director" means the Director of the City of Lake Oswego Public Works Department.

(2) "Local improvement" means:

(a) The grading, graveling, paving or other surfacing of any street, or opening, laying out, widening, extending, altering, changing the grade of or constructing any street.

(b) The construction or reconstruction of sidewalks.

(c) The installation of ornamental street lights.

(d) The installation of underground wiring or related equipment.

(e) The reconstruction or repair of any street improvement mentioned in this subsection.

(f) The construction, reconstruction or repair of any sanitary or storm sewer, or water main.

(g) The acquisition, establishment, construction or reconstruction of any off-street motor vehicle parking facility.

(h) The construction, reconstruction or repair of any flood control dike or dam.

(i) The construction, reconstruction, installation and equipping of a park, playground or City recreation facility.

(j) Any other local improvement for which an assessment may be made on the property specially benefited.

(3) "Lot" means lot, block, or parcel of land.

(4) "Owner" means the owner of the title to real property or the contract purchaser of real property, of record as shown on the last available complete assessment roll in the office of the county assessor.

(5) "Recorder" means the City Recorder for the City of Lake Oswego. (Ord. No. 365, Sec. 1; 6-22-48. Ord. No. 737, Sec. 1; 11-15-60. Ord. No. 1247, Sec. 1; 8-6-68. Ord. No. 1276, Sec. 1; 12-3-68. Ord. No. 1603, Sec. 1; 1-20-76. Ord. No. 1802, Sec. 1; 6-9-81.)

40.020. Initiation of Proceedings.

(1) Whenever the City Council deems it expedient to perform any local improvement for which it is anticipated that special assessments will be levied, it shall, by resolution, declare its intention to initiate such improvement and direct that an engineering study of such project be made and that a written project report containing the information specified in LOC 40.030 be filed with the Recorder.

(2) Whenever the City of Lake Oswego has expended funds for the construction of any local improvement and subsequently the City Council deems it expedient to initiate a local improvement district in order

to levy special assessments against the property benefited by such local improvement, it shall, by resolution, declare its intention to initiate such improvement district and direct that the final plans of this public improvement as constructed, together with a written project report containing the information specified in LOC 40.030 be filed with the Recorder.

(3) Whenever the owners of 51 percent of the abutting property owners propose a local improvement over an area at least 100 yards in length or serving an area of at least 100 square yards and desire to form themselves into an improvement district for the purpose of accomplishing such improvement they may, by written petition filed with the Director, request the Council to declare by resolution the intent of the Council to initiate such improvement and to direct the preparation of the study as specified in subsection (1) of this section. The Council, if satisfied that the petition is signed by owners of at least 51 percent of the property owned within the proposed district specified in the petition, shall pass the requested resolution unless, by a vote of at least two-thirds of the Councilors present, the Council deems it not in the public interest to comply with the petition. (Ord. No. 365, Sec. 1; 6-22-48. Ord. No. 1247, Sec. 2; 8-6-68. Ord. No. 1802, Sec. 2; 6-9-81.)

40.030. Written Report; Content.

The written project report specified in LOC 40.020 shall contain the following information:

(1) A full description of the project and its boundaries. Project plans and specifications shall be prepared but need not be filed with the report;

(2) An estimate of the probable cost of such project (or a statement of the actual cost if the project has been completed) including legal, administrative, construction interest, and engineering costs attributable thereto.

(3) A map of the proposed local improvement district.

(4) A recommended method of assessment.

(5) A description of each lot, or portion thereof, specially benefited by the project with the name and address of the owner thereof, as shown by the last assessment roll of the county.

(6) The assessed valuation and estimated amount of assessment of each lot or portion thereof specially benefited, together with any unpaid assessments against each lot.

(7) The construction financing interest rate then currently in effect and the number of the resolution establishing that rate. (Ord. No. 365, Sec. 2; 6-22-48. Ord. No. 381, Sec. 1; 4-26-49. Ord. No. 1276, Sec. 2; 12-3-68. Ord. No. 1603, Sec. 2; 1-20-76. Ord. No. 1802, Sec. 3; 6-9-81.)

40.040. Notice of Hearing.

Promptly after the filing of the written project report as required by LOC 40.020, the Recorder shall:

(1) Cause a notice to be published for a period of two successive publications in a newspaper of general

circulation in the City. The notice shall state the following:

(a) That the written project report is on file and may be examined at the Recorder's office,

(b) The date the written project report was filed,

(c) The estimated probable cost of the proposed improvement or the actual cost of the improvement if it has been completed,

(d) A description of the proposed improvement district and that a preliminary map of the proposed district may be examined at City Hall.

(e) The time and place of the hearing required by LOC 40.060 including a statement that oral objections will be considered at such hearing, but shall not be counted as part of the written remonstrance requirement necessary to suspend the project for six months pursuant to LOC 40.050.

(f) That all persons wishing to formally remonstrate against the formation of the district must present their remonstrance in writing in the time and manner set forth in LOC 40.050 for them to be considered remonstrances for the purpose of LOC 40.050.

(2) Not less than 10 days prior to the hearing required by LOC 40.060, mail to each property owner designated in the written engineering report a notice stating:

(a) The information set forth in subsection (1) of this section.

(b) The recommended method of assessment.

(c) The estimated amount of assessment for each lot or portion thereof owned by the owner and whether the assessments are being levied prior to construction based upon estimates of project cost or after construction based upon known costs.

(d) The construction financing interest rate currently in effect and the number of the resolution establishing that rate.

(e) The specific procedure for filing remonstrances provided by LOC 40.050.

(3) Post a copy of the preliminary map of the proposed improvement district at City Hall. (Ord. No. 365, Sec. 3, 6-22-48. Ord. No. 1802, Sec. 4; 6-9-81. Ord. No. 1836, Sec. 1; 7-29-82.)

40.050. Filing of Remonstrance to Formation of Improvement District; Defeat of Proposal by Remonstrance.

(1) Objections by property owners within the proposed district to the formation of the proposed improvement district must be in writing, and filed with the Recorder not later than the close of business the day of the hearing set forth in LOC 40.060. Except as provided by Section 37 of the Lake Oswego Charter, any proposal to levy and collect any special assessment under this chapter shall be suspended for six months upon written remonstrance of two-thirds of the owners of property to be assessed.

(2) Oral objections will be considered at the hearing provided in LOC 40.060. However, oral objections shall not be counted for the purpose of suspending the project as provided in subsection (1) of this section. (Ord. No. 365, Sec. 4; 6-22-48. Ord. No. 1247, Sec. 4; 8-6-68. Ord. No. 1276, Sec. 3; 12-3-68. Ord. No. 1417, Sec. 1; 2-2-71. Ord. No. 1802, Sec. 5; 6-9-81.)

40.060. Hearing; Objections; Authorization To Form District and Construct Project.

(1) After the filing of the written engineering report, but not less than fifteen days after the date of the first publication of notice pursuant to LOC 40.040(1), the Council shall hold a hearing to consider any objections to the proposed improvement district and authorize the formation of the district and initiation of the project if it is so desired.

(2) After considering any written remonstrances filed and any testimony relating to the proposed district, the City may, by resolution adopt, amend and adopt, or reject the written project report. The Council may require a supplementary or further report from the Director. If the Council chooses to adopt, or amend and adopt the report, the resolution setting forth that determination shall at a minimum:

(a) Form the local improvement district, assign it a number, and establish its boundaries, subject to later change pursuant to the provisions of this chapter.

(b) Determine the time and manner of construction. The Council may provide that the City will do the work or any portion of the work itself.

(c) Direct that the project be commenced.

(d) Establish a special account for the receipt and disbursal of monies relating to the project.

(e) Establish the method of assessment, subject to change pursuant to the provisions of this chapter.

(f) Place a pending lien upon the benefited property specified in the written project report as adopted. The pending lien shall be recorded in the same manner as the final assessment lien provided in LOC 40.120.

(g) Establish the construction financing interest rate applicable to the district. (Ord. No. 365, Sec. 4; 6-22-48. Ord. No. 1067, Sec. 1; 5-18-65. Ord. No. 1247, Sec. 5; 8-6-68. Ord. No. 1802, Sec. 6; 6-9-81.)

40.065. District Boundary Modification.

(1) At any time the Council may determine that the boundaries of a district which has been formed should be modified to include new property benefited by the improvement or excluded property determined not to be benefited.

(2) The Council shall accomplish boundary modifications by amending the resolution which formed the district.

(3) Prior to adoption of the amending resolution the Council shall hold a hearing on the boundary modification. Notice of the hearing shall be given as provided by LOC 40.040.

(4) The right of property owners to remonstrate against the proposed modification is the same as defined in LOC 40.050 for the formation of a district. (Ord. No. 1802, Sec. 7; 6-9-81.)

40.070. Method of Assessment; Authority of City to Pay All or Part of Costs.

The Council may:

(1) Use any just and reasonable method of determining the extent of any improvement district that is consistent with the benefits derived.

(2) Authorize payment by the City of all or any part of the cost of such improvement; provided, that the method selected creates a reasonable relation between the benefits derived by the property specially benefitted and the benefits derived by the City as a whole.

(3) Use any method of apportioning the sum to be assessed among the properties determined to be specially benefitted that is just and reasonable.

(4) At any time prior to the effective date of the ordinance levying the assessments for any district, modify the method adopted in the resolution forming the district if the Council determines that a different method is a more just and reasonable method of apportioning the cost of the project to the properties benefitted. The time

limitation established by this subsection does not apply to reassessment proceedings pursuant to LOC 40.160 and the method of assessment may be modified as a part of such proceedings. (Ord. No. 365, Sec. 5; 6-22-48. Ord. No. 1247, Sec. 6; 8-6-68. Ord. No. 1603, Sec. 3; 1-20-76. Ord. No. 1802, Sec. 8; 6-9-81. Ord. No. 1829, Sec. 1; 5-18-82.)

40.080. Director's Assessment Report; Proposed Assessment and Notice Thereof.

(1) As soon as the total cost of the project is ascertained, or if the district is to be preassessed, as soon as the estimated cost of the project is ascertained, the Director shall prepare an assessment report on the project, including a recommendation concerning the fair apportionment to the properties specially benefitted within the assessment district of the total actual or estimated cost, including legal, administrative, construction interest, and engineering costs attributable to the project and a recommendation concerning the Bancroft installment financing rate applicable to the project.

(2) A map of the assessment district showing the proposed assessments of each lot or portion of land therein shall be posted in the City Hall and a notice published in a newspaper of general circulation within the City for two successive weeks stating that the proposed assessments are on file at the City Hall and requiring all persons having objections to the proposed assessments to present their objections at a meeting of the Council which shall be held not less than fifteen (15) days after first publication of such notice.

(3) It shall be the duty of the Recorder to send by mail postpaid to each of those designated in the report of the Director a notice which sets forth that the map showing the proposed assessments is on file in the City Hall, the amount of the proposed assessment on a lot or portion of a lot owned by such persons, the recommended Bancroft installment financing rate and requiring objections to the proposed assessments to be presented to the City Council at the time specified in the published notice. The notices which are required to be mailed shall be placed in the mail not less than ten (10) days prior to the date set for the meeting of the Council to hear objections to the proposed assessments. (Ord. No. 365, Sec. 6; 6-22-48. Ord. No. 1247, Sec. 6; 8-6-68. Ord. No. 1603, Sec. 4; 1-20-76. Ord. No. 1802, Sec. 9; 6-9-81. Ord. No. 1836, Sec. 2; 7-29-82.)

40.090. Hearing on Proposed Assessments; Levy of Assessments.

(1) When the Council after hearing the objections to the proposed assessments has ascertained what it deems to be a fair, just and proper assessment of benefits to the property it determines to be specially benefited, it may pass an ordinance specifying in detail such assessments and setting the Bancroft installment financing rate applicable to the district.

(2) If the Council at such hearing deems it just and proper to increase the amount of any proposed assessment it shall fix a time for a further hearing on such increase. The Recorder shall send notice by mail to each owner shown on the Director's final report, stating the

purpose of the further hearing and giving the date of the hearing.

(3) After such further hearing, the Council may pass an ordinance assessing such increase, and if at the time of such further hearing, the ordinance specifying in detail the final assessments has not yet been passed, the Council at that time shall pass such an ordinance levying the final assessments and setting the financing interest rate.

(4) Promptly after passage of the ordinance levying the final assessments, the City Recorder shall cause to be published in a newspaper of general circulation within the City, a notice that such ordinance has been passed, and that application for bonding the assessments will be received for thirty (30) days after the effective date of the ordinance. (Ord. No. 365, Sec. 7; 6-22-48. Ord. No. 1802, Sec. 10; 6-9-81.)

40.100. Alternative Methods of Financing.

When, in the opinion of the Council, on account of topographical or physical layout, unusual or excessive public travel, or other character of work involved, or when the Council otherwise believes the situation warrants it, it may contribute what it deems a fair proportion of the cost of such improvement from general funds of the city, and the amount to be assessed to the property benefitted shall be proportionately reduced. Nothing contained in this chapter shall preclude the Council from using other available means of financing improvements, including federal or state grants-in-aid, sewer service or other types of service charges, revenue bonds, general obligation bonds, or other legal means of finance. In the

event any of such other means of financing are used, the Council may, in its discretion, levy special assessments pursuant to this chapter to cover any part of the costs of the improvement not covered by such means. (Ord. No. 365, Sec. 8; 6-22-48.)

40.110. Appeals.

Owners of any property against which an assessment or reassessment for local improvements has been imposed may seek a review thereof under the provisions of ORS 34.010 to 34.100. (Ord. No. 365, Sec. 9; 6-22-48. Ord. No. 1603, Sec. 5; 1-20-76.)

40.120. Recordation of Liens and Collection of Assessments.

The Council, at the time of passing the ordinance levying the final assessment or at any time thereafter, shall by resolution or ordinance direct the City Recorder to enter in the docket of city liens the respective amounts assessed upon each particular tract or parcel of land with the names of the record owners thereof. Upon such entry in the lien docket, the amounts so entered shall be immediately due and payable and shall be a lien and charge upon the respective lots, tracts, and parcels of land against which the same are placed. Such liens shall be first and prior to all other liens except as otherwise provided by law. The Bancroft installment financing interest rate applicable to the district shall be charged on all amounts not paid within 30 days from the date of such entry. After 30 days from the date of entry in the lien docket, the city may proceed to foreclose as delinquent

any lien which is unpaid or for which arrangements for payment have not been made. The delinquent assessment payment interest rate shall be charged to such sums due. Foreclosure may be in any manner authorized by state statutes for the foreclosure of assessment liens. (Ord. No. 365, Sec. 10; 6-22-48. Ord. No. 1360, Sec. 1; 1-6-70. Ord. No. 1603, Sec. 6; 1-20-76. Ord. No. 1802, Sec. 11; 6-9-81.)

40.130. Authority to Abandon Proceedings.

The City Council shall have full power and authority to abandon and rescind proceedings for projects pursuant to this chapter at any time prior to the final consummation of such proceedings. (Ord. No. 365, Sec. 11; 6-22-48.)

40.140. Validity of Assessments.

No assessment made pursuant to this chapter shall be invalid by reason of a failure to give, in any report, in the proposed assessment, in the ordinance making the assessment, in the lien docket or elsewhere in the proceedings, the name of the owner of any lot, tract or parcel of land or the name of any person having a lien upon or interest therein, or by a mistake in the name of any such person, or the entry of a name other than the name of such owner or other person having a lien upon or interest therein, or by a mistake in the name of any such person or the entry of a name other than the name of such owner or other person having a lien upon or interest in such property, or by reason of any error, mistake, delay, omission, irregularity, or other act, jurisdictional or otherwise, in any of the proceedings or steps herein before specified, unless it appears that reasonable notice has not been

given of the hearing upon the proposed assessment or that the assessment as made, insofar as it affects the person complaining, is unfair and unjust, and the Council shall have power and authority to remedy and correct all such matters by suitable action and proceedings. (Ord. No. 365, Sec. 13; 6-22-48.)

40.150. Adoption of "Bancroft Bonding Act".

Except for matters modified in this chapter, the provisions of ORS 223.205 to 223.300 (1979 replacement part), which are known as the "Bancroft Bonding Act", are hereby adopted and made a part hereof by reference. (Ord. No. 365, Sec. 12; 6-22-48. Ord. No. 1802, Sec. 12; 6-9-81.)

40.151. Interest Rates.

(1) Interest on funds expended by the City in connection with the construction or financing of a local improvement shall be charged. There is established for the purpose of computing interest the following distinct interest rate classifications:

(a) Construction financing – Interest charged for construction financing begins the date the first funds are expended in connection with a project and ends on the 60th day after acceptance of the project by City.

(b) Bancroft installment financing – Interest charged to property owners choosing to pay the assessment in installments under the Bancroft Bonding Act procedures whose accounts are kept current.

(c) Delinquent Assessment Payment – Interest charged to property owners choosing to pay the assessment in installments under Bancroft Bonding procedures who fail to pay two consecutive installment payments. This interest rate will be assessed beginning the day after the due date of the second installment payment. The interest due will be computed at this delinquent rate on the entire principal balance and this rate will continue to be charged until all outstanding billings are paid in full. This interest rate is also charged to those property owners not choosing to pay in installments that have not paid pursuant to LOC 40.120. For such accounts the rate begins on the 31st day after entry of the assessment in the lien docket and is computed from the original date of entry in the lien docket. (Ord. No. 1875, Sec. 1; 2-21-84.)

(d) System development charge financing – Interest charged to persons financing a system development charge through the Bancroft Bonding Act procedures pursuant to LOC 39.04.070.

(2) The Council shall, by resolution, establish the interest rate applicable to each classification identified in subsection (1) of this section. Such interest rate shall not exceed the maximum allowed by any applicable law. In the event that the rate established is found to exceed such legal maximum then that maximum shall be used as the applicable rate until the resolution establishing rates is revised. (Ord. No. 1802, Sec. 13; 6-9-81.)

40.155. Segregation of Assessments; Fees.

Whenever an application has been made under the provisions of LOC 40.150 (and the Bancroft Bonding Act

as therein adopted), and the application has been accepted and the payment of the assessment has been in fact financed by such procedure, the lien of such assessment may be segregated upon the following terms and conditions:

1. The property for which the segregation is to be made shall have been assessed as a unit and entered accordingly in the docket of liens.

2. There shall be no delinquent installments of principal or interest on the assessment of the entire parcel.

3. Written application shall be made to the City in such form as may be required, and such applications shall be accompanied by the fees established as hereafter provided.

4. If the Director of Public Works determines that the lien may be segregated and divided without prejudice to the overall security of the entire balance owed, he shall establish an equitable division of the assessment based upon the original assessment formula and the preservation of the security interest. Such segregation shall describe the various parcels of the entire tract and the amount of the assessment to be apportioned to each parcel. He may require that the portion of the assessment segregated and apportioned to a particular parcel be paid in full before the remaining parcels shall be relieved of liability for payment of that portion of the lien.

5. If application is approved and the fees paid, the Director of Public Works shall certify the facts to the City

Recorder. Thereupon, upon compliance with any conditions of payment, the City Recorder shall cause appropriate entries to be made in the docket of liens segregating the total assessment. When such entries are made, the lien shall thereby be segregated and divided, and shall constitute a lien only in the amounts and as to the parcels thereby provided.

In order to help defray the costs of investigation, preparing legal descriptions, calculating an equitable division of the assessment and making lien docket entries, the City Council may by resolution establish and from time to time amend a schedule of fees to be paid with any application filed under this section. Such fees shall not be refundable if the application is disapproved or the applicant withdraws his application. (Ord. No. 1526, Sec. 1; 12-4-73.)

40.160. Reassessment.

Whenever all or part of an assessment or reassessment for any local improvement is declared void or set aside for any reason, or its enforcement refused by any court, whether directly or by any decision of such court; whenever the Council shall be in doubt as to the validity of such assessment or reassessment, or if a district was preassessed and the Council determines the assessments should be adjusted, the Council may make a new assessment. The reassessment procedures for making the new assessment shall insofar as possible follow the same procedures as provided for making an initial assessment as set forth in LOC 40.070 to 40.150. The new assessment

shall not be limited to the amounts included in the original assessments, nor shall it be limited to the property embraced in the original assessment if the Council finds that additional property is specially benefitted and subject to assessment. Credit shall be allowed on the new assessment for any payments made on the original assessment, such payments to be credited as of the date of payment. Interest on the original assessments may be included in the new assessment to the extent that the new assessment includes amounts also included in the original assessment; or if the Council deems it more equitable to do so, it may include as part of the overall assessable project costs interest, not exceeding the construction financing interest rate in effect and applicable to the district at the time of the original proceedings in connection with the district, on monies paid by the City in connection with the construction or financing of the project. (Ord. No. 365, Sec. 14; 6-22-48. Ord. No. 1603, Sec. 7; 1-20-76. Ord. No. 1802, Sec. 14; 6-9-81. Ord. No. 1836, Sec. 3; 7-29-82.)

OREGON REVISED STATUTES (ORS) 223.387 TO 223.401

ASSESSMENTS FOR LOCAL IMPROVEMENTS

223.387 Description of real property; effect of error in name of owner. In levying, collecting and enforcing assessments for local improvement, the following shall apply:

(1) Real property may be described by giving the subdivision according to the United States survey when coincident with the boundaries thereof, or by lots, blocks

and addition names, or by giving the boundaries thereof by metes and bounds, or by reference to the book and page of any public record of the county where the description may be found, or by designation of tax lot number referring to a record kept by the assessor of descriptions of real properties of the county, which record shall constitute a public record, or in any other manner as to cause the description to be capable of being made certain. Initial letters, abbreviations, figures, fractions and exponents, to designate the township, range, section, or part of a section, or the number of any lot or block or part thereof, or any distance, course, bearing or direction, may be employed in any description of real property.

(2) If the owner of any land is unknown, the land may be assessed to "unknown owner," or "unknown owners." If the property is correctly described, no final assessment shall be invalidated by a mistake in the name of the owner of the real property assessed or by the omission of the name of the owner or the entry of a name other than that of the true owner. Where the name of the true owner, or the owner of record, of any parcel of real property is given, the final assessment shall not be held invalid on account of any error or irregularity in the description if the description would be sufficient in a deed of conveyance from the owner, or is such that, in a suit to enforce a contract to convey, employing such description a court of equity would hold it to be good and sufficient.

(3) Any description of real property which conforms substantially to the requirements of this section shall be a sufficient description in all proceedings of assessment relating or leading to a final assessment for a

local improvement, foreclosure and sale of delinquent assessments, and in any other proceeding related to or connected with levying, collecting and enforcing final assessments for special benefits to the property. [1959 c. 219 § 1; 1965 c.282 § 4; 1971 c.198 § 1; 1991 c.902 § 36]

223.389 Procedure in making local assessments for local improvements. (1) The governing body of a governmental unit may prescribe by ordinance or resolution the procedure to be followed in making estimated assessments and final assessments for benefits from a local improvement upon the lots which have been benefited by all or part of the local improvement, to the extent that the charter of the governmental unit does not prescribe the method of procedure. In addition, in any case where the charter of a governmental unit specifies a method of procedure that does not comply or is not consistent with the requirements of the Oregon Constitution, the governing body of the governmental unit may prescribe by ordinance or resolution the procedure which shall comply and be consistent with the requirements of the Oregon Constitution, and the provisions of the ordinance or resolution shall apply in lieu of the charter provisions.

(2)(a) The ordinance or resolution prescribing the procedure shall provide for adoption or enactment of an ordinance or resolution designating the local improvement as to which an assessment is contemplated, describing the boundaries of the district to be assessed. Provision shall be made for at least 10 days' notice to owners of property within the proposed district in which the local improvement is contemplated. The notice may be made by posting, by newspaper publication or by mail, or by any combination of such methods. The notice

shall specify the time and place where the governing body will hear and consider objections or remonstrances to the proposed local improvement by any parties aggrieved thereby.

(b) If the governing body determines that the local improvement shall be made, when the estimated cost thereof is ascertained on the basis of the contract award or the departmental cost of the governmental unit, the governing body shall determine whether the property benefited shall bear all or a portion of the cost. The recorder or other person designated by the governing body shall prepare the estimated assessment to the respective lots within the assessment district and file it in the appropriate office of the governmental unit. Notice of the estimated assessment shall be mailed or personally delivered to the owner of each lot proposed to be assessed. The notice shall state the amounts of the estimated assessment proposed on that property and shall fix a date by which time objections shall be filed with the recorder. Any objection shall state the grounds for the objection. The governing body shall consider the objections and grounds and may adopt, correct, modify or revise the estimated assessments.

(c) The governing body shall determine the amount of estimated assessment to be charged against each lot within the district, according to the special and peculiar benefits accruing to the lot from the local improvement, and shall by ordinance or resolution spread the estimated assessments. [1959 c.219 § 2; 1991 c.902 § 37]

223.391 Notice of proposed assessment to owner of affected lot. If a notice is required to be sent to the owner

of a lot affected by a proposed assessment, the notice shall be addressed to the owner or the owner's agent. If the address of the owner or of the owner's agent is unknown to the recorder, the recorder shall mail the notice addressed to the owner or the owner's agent at the address where the property is located. Any mistake, error, omission or failure with respect to the mailing shall not be jurisdictional or invalidate the assessment proceedings, but there shall be no foreclosure or legal action to collect until notice has been given by personal service upon the property owner, or, if personal service cannot be had, then by publication once a week for two successive weeks in a newspaper designated by the governing body and having general circulation in the governmental unit where the property is located. [1959 c.219 § 3; 1991 c.902 § 38]

223.393 Assessments become liens. Estimated and final assessments shall become a lien upon the property assessed from and after the passage of the ordinance or resolution spreading the same and entry in appropriate lien record of the governmental unit. The estimated assessment lien shall continue until the time the estimated assessment becomes a final assessment. The governmental unit may enforce collection of such assessments as provided by ORS 223.505 to 223.650. [1959 c.219 § 4; 1991 c. 902 § 39]

223.395 Deficit assessments or refunds when initial assessment based on estimated cost. If the initial assessment has been made on the basis of estimated cost, and upon the completion of the work the cost is found to be greater than the estimated cost, the governing body may

make a deficit assessment for the additional cost. Proposed assessments upon the respective lots within the assessment district for the proportionate share of the deficit shall be made; and notices shall be sent; opportunity for objections shall be given; such objections shall be considered; and determination of the assessment against each particular lot, block or parcel of land shall be made as in the case of the initial assessment; and the deficit assessment spread by ordinance. If assessments have been made on the basis of estimated cost, and upon completion the cost is found to be less than the estimated cost, provision shall be made for refund of the excess or overplus. [1959 c.219 § 5; 1991 c.902 § 40]

223.397 [1959 c.219 §§ 6, 7; repealed by 1963 c.507 § 1]

223.399 Powers of governmental unit concerning assessments for local improvements. The governing body of a governmental unit may impose additional procedural requirements. The procedural provisions of ORS 223.387 to 223.399 shall apply only where the charter or an ordinance of a governmental unit does not specify otherwise and the charter or ordinance provisions comply and are consistent with the requirements of the Oregon Constitution. The charter or ordinance provisions shall apply to local improvements permitted by law. No governmental unit shall authorize a local improvement prohibited by percentage of remonstrance or otherwise under the charter of the governmental unit. [1959 c.219 § 8; 1965 c.133 § 1; 1991 c.902 § 41]

223.401 Review of assessment. Notwithstanding any of the provisions of ORS 223.387 to 223.399, owners of any property against which an assessment for local

improvements has been imposed may seek a review thereof under the provisions of ORS 34.010 to 34.100. [1965 c.133 § 2].